Jurisdictional Statement

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In The

Supreme Court of the United States

October Term, 1981

No.

STATE OF NORTH DAKOTA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

JURISDICTIONAL STATEMENT
APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ROBERT O. WEFALD,
Attorney General
State of North Dakota

MURRAY G. SAGSVEEN
Counsel of Record
Special Assistant Attorney General
Zuger & Bucklin
P.O. Box 1695
Bismarck, ND 58502
701-223-2711
Counsel for Appellant

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QUESTIONS PRESENTED

1. When federal law prohibits the acquisition of any land with moneys from the Migratory Bird Conservation Fund without State approval, can a state constitutionally deny, revoke, qualify, or condition such approval.

2. Does the federal law prohibiting the acquisition of any land with moneys from the Migratory Bird Conservation Fund without state approval apply to the acquisition of waterfowl production areas (fee and easement) with such moneys.

TABLE OF CONTENTS

Page

Table of Authorities ii

Opinions Below 1

Questions Presented 2

Jurisdiction 2

Statement of the Case 3

The Questions Presented are Substantial 9

I. Introduction 9

II. The Approval of the Governor (or appropriate State agency) is necessary for federal acquisition of a waterfowl production area and the State can deny, revoke, qualify or condition such approval 11

III. The Challenged State Laws are a Constitutional Limitation on Federal Acquisitions 14

IV. The Questions Presented are Substantial 17

Conclusion 17

Appendix . . . .

TABLE OF AUTHORITIES

Page

Administrator, Federal Aviation Administration v. Robertson, 442 U.S. 255, 266 (1975) 13

Board of Directors, Garrison Diversion Conservancy District, v. Andrus, A2-80-22 (D. ND March 18, 1981) 7

Caminetti v. United States, 252 U.S. 470, 485 (1917) 12

Consumer Product Safety Commission v. GTE Sylvania, Inc., _____ U.S. _____, 100 S. Ct. 2051, 2056 (1980) 12

E.I. du Pont de Nemours & Co. v. Collins, 432 U.S. 46, 54 (1977) 13

Kleppe v. New Mexico, 426 U.S. 529 (1976) 10

Little Lake Misere Land Co. v. United States, 412 U.S. 580, 596-97 (1973) 14, 15, 16

McGroom v. Scales, 76 U.S. 23 (1870) 9

Morton v. Mancari, 417 U.S. 535, 551 (1974) 13

NLRB v. Bell Aerospace Co. Division of Textron, Inc., 416 U.S. 266, 274 (1974) 13

Nashville Milk Company v. Carnation Company, 335 U.S. 373, reh. den., 355 U.S. 967 (1958) 12

National Wildlife Federation v. Alexander,
613 F. 2d 1054 (D.C. Cir. 1979) 7

Palmer v. Commonwealth of Massachusetts,
308 U.S. 79, 83 (1939) 13

Philbrook v. Glodgett,
421 U.S. 707, 713 (1975) 13

State Land Board v. Corvallis Sand & Gravel Co.,
429 U.S. 363, 378 (1977) 14

United States v. Welden,
377 U.S. 95, 98 at fn. 4 (1964) 12

United States of America v. Welte,
No. C2-81-49 (D. N.D.) 7

Werner v. U.S. Department of Interior, Fish and Wildlife,
518 F. 2d 168 (8th Cir. 1978) 6

FEDERAL STATUTES

16 U.S.C. §715f 12, 14
16 U.S.C. §715k-5 . . . . . passim
16 U.S.C §718d 3, 12, 16
28 U.S.C. §1254(2) 2

Flood Control Act of 1944 (58 Stat. 887) 9
Migratory Bird Conservation Act
(16 U.S.C. §715 et seq.) . . . . . passim
Migratory Bird Hunting Stamp Act
(16 U.S.C. §718 et seq.) . . . . . passim
50 CFR 25.11, et seq.
(The National Wildlife Refuge System) 10

STATE STATUTES

North Dakota Century Code

Section 20.1-02-18 . . . . . 2, 3, 8, 17
Section 20.1-02-18.1 . . . . . 2, 3, 8, 16
Section 20.1-02-18.2 . . . . . 2, 3, 8, 16
Section 20.1-02-18.3 . . . . . 3, 8
Section 47-05-02.1 . . . . . 2, 3, 8, 15

Minnesota Statute 1949, Section 1.041 16

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October Term, 1981

No.

STATE OF NORTH DAKOTA, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

The State of North Dakota, appeals from the judgment of the United States Court of Appeals for the Eighth Circuit, dated June 3, 1981, holding that several state statutes unconstitutionally interfere with the acquisition of land by the United States for "waterfowl production areas" and that the Governor's consent is not required for such acquisitions.

OPINIONS BELOW

The opinions of the United States District Court for the District of North Dakota, which appear in the appendix at pp. 8a through 15a, *infra,* are not reported.

The opinion of the United States Court of Appeals for the Eighth Circuit, which appears in the appendix at pp. 18 through 32a, *infra,* is reported at 650 F2d 911.

QUESTIONS PRESENTED

1. When federal law prohibits the acquisition of any land with moneys from the Migratory Bird Conservation Fund without State approval, can a state constitutionally deny, revoke, qualify, or condition such approval.

2. Does the federal law prohibiting the acquisition of any land with moneys from the Migratory Bird Conservation Fund without state approval apply to the acquisition of waterfowl production areas (fee and easement) with such moneys.

JURISDICTION

The judgment of the United States District Court was entered on July 14, 1980. The United States District Court declared (1) that North Dakota Century Code §§20.1-02-18, 20.1-02-18.1, 20.1-02-18.2 and 47-05-02.1 unconstitutionally interfered with federal land acquisitions in North Dakota; and (2) that the Governor's consent is not required for federal acquisition of waterfowl production areas notwithstanding the consent requirement of 16 U.S.C. §715k-5 (see pp. 8a through 17a).

The State of North Dakota appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court in a decision entered June 3, 1981 (see pp. 18a through 32a). The State of North Dakota petitioned for a rehearing; the petition was denied on July 21, 1981 (see p. 32a).

The Notice of Appeal was filed with the United States Court of Appeals for the Eighth Circuit on September 21, 1981 (see pp. 33a and 34a).

This appeal is being docketed in this Court within 90 days from the denial of rehearing by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND STATE STATUTES

(text at pp. 1a through 6a)

U.S. Const. Art. VI, Cl. 2

16 U.S.C. §715k-5
16 U.S.C. §718d

North Dakota Century Code Sections 20.1-02-18, 20.1-02-18.1, 20.1-02-18.2, 20.1-02-18.3 and 47-05-02.1

STATEMENT OF THE CASE

The Migratory Bird Conservation Act and subsequent related laws are unique because they established a federal-state partnership to determine which lands should be acquired for the benefit of migratory waterfowl. A brief review of the federal laws reveals the nature of the federal-state partnership and the errors of the courts below.

The 1929 Migratory Bird Conservation Act[1] authorizes the Secretary of the Interior to acquire land for inviolate migratory bird sanctuaries (refuges). Section 7 of the Act contains an unusual requirement: the federal government may not acquire land unless a state consents "by law". 45 Stat. 1223; 16 U.S.C. §715f. The State of North Dakota gave its consent in 1931. Ch. 207, 1931 North Dakota Session Laws.

The 1934 Migratory Bird Hunting Stamp Act[2] soon provided a funding mechanism for the refuge acquisition program. Migratory bird hunting and conservation stamps (duck stamps) were sold to generate revenue for the newly-created Migratory Bird Conservation Fund.

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[1] Act of February 18, 1929; 45 Stat. 1222; 16 U.S.C. §715 *et seq.*

[2] Act of March 16, 1934; 48 Stat. 451; 16 U.S.C. §718 *et seq.*

The Secretary of the Interior was given flexibility to acquire "waterfowl production areas" in 1958. 72 Stat. 487; 16 U.S.C. §718d (c) (see p. 1a, *infra*). The statutory authority stated, in part:

> The Secretary of the Interior is authorized . . . to acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange, of small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto. Such small areas, to be designated as "Waterfowl Production Areas", may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act . . .

It is obvious that the 1958 amendment relieved the Secretary of the Interior from the requirement that the State consent to waterfowl production area acquisitions.

State participation in the acquisition decision-making process was restored, however, in 1961. At that time, Congress was informed that a wetlands acquisition "crash program" was necessary but that normal revenues to the Migratory Bird Conservation Fund could not finance a massive land acquisition program. 107 Cong. Rec. 12203 (1961) (remarks of Mr. Johnson). Congress, accordingly, determined that a $105 million interest-free loan to the Fund was necessary. Congress however, also recognized that the traditional state involvement should be extended to all acquisitions involving moneys from

the Migratory Bird Conservation Fund.[3] The legislation,[4] as finally enacted, stated:

> . . . no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency.

The federal-state partnership was successful for many years. The federal government acquired interests in 5.3 million acres[5] (about 8,300 square miles) of land in North Dakota for the

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[3] This recognition was expressed during debates in the House and Senate. Representative Short of North Dakota related concern about indiscriminate federal acquisitions: "This has happened time and time again in North Dakota, and it has had an extremely adverse effect on many of our local political subdivisions . . . there are practical aspects that should be kept in mind." 107 Cong. Rec. 12205 (1961). Senator Magnuson stated: "We added an amendment to the bill . . . to provide that no land should be purchased under the plan unless the federal government and the State involved has a complete agreement, either with the Governor or the State agency . . . It is provided that they must be in *complete agreement as to the nature of the lands and the acreage involved.* 107 Cong. Rec. 17171 (1961). [Emphasis added].

[4] Act of October 4, 1961, Pub. L. 87-383, 75 Stat. 813; 16 U.S.C. §715k-5. See p. 2a *infra.*

[5] This agreage includes 418,570 acres owned in fee for National Wildlife Refuges and Waterfowl Production Areas and 4,855,851 acres of privately owned land over which the United States has easement interests.

benefit of migratory waterfowl, and most of the acquisitions have been within the past twenty years.[6]

Serious opposition to the federal acquisitions in North Dakota arose, however, in the late 1960's and early 1970's. Five examples illustrate the reasons for the opposition:

1. Fee land acquired by the United States caused economic problems for political subdivisions because of the lost tax revenue.[7]

2. Misrepresentations were made to landowners by federal acquisition personnel to induce the conveyance of property interests to the United States.[8]

3. Federal support for the Starkweather Watershed Project was withdrawn, thereby causing collapse of the watershed project, after the U.S. Fish and Wildlife Service had acquired thou-

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[6] Easements covering 4,788,330 acres have been acquired since passage of the 1958 Act (72 Stat. 487). The easements are quoted at p. 6a, infra.

[7] This problem was partially remedied by the passage of a law which authorizes the Secretary of the Interior to make payments in lieu of taxes to counties for the benefit of public schools and roads. Act of August 30, 1964; P.L. 88-523; 78 Stat. 701; 16 U.S.C. §715s. The Governor of North Dakota was instrumental in securing passage of the Act because he suspended the acquisition of land for refuges when counties complained about the tax problems. 1964 U.S. Cong. & Adm. News 3266.

[8] Landowners were assured, during negotiations when waterfowl production area easements were acquired, that certain local farming practices (e.g., the use of farm implements to drain shallow sloughs) would be authorized. However, when the landowners continued these farming practices after conveying the easements, civil enforcement action was threatened. The courts later determined that the terms of the easements did not permit such practices, but the decisions did not alleviate the accrued ill-will. *Werner v. U.S. Department of Interior, Fish and Wildlife*, 581 F2d 168 (8th Cir. 1978).

sands of acres of land for fish and wildlife mitigation purposes in connection with the project.[9]

4. North Dakota conveyed 15,910 acres of land to the United States for fish and wildlife mitigation for the Garrison Diversion Unit, a federal reclamation project. After the land had been acquired, federal officials refused to give the state any mitigation acreage credit, but the land was retained by the United States.[10]

5. The United States declared that private land (about 4.8 million acres) subject to a "waterfowl production area easement" is a part of the National Wildlife Refuge System and that landowners would, therefore, be subject to criminal prosecution for easement "violation".[11] This issue (whether such private land is part of the National Wildlife Refuge System) is presently being litigated.[12]

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[9] The Starkweather Watershed Project was a comprehensive watershed management program designed to prevent recurring flooding within the Devils Lake Basin. Planning led to a 1970 agreement under which thousands of wetland acres were acquired by the U.S. Fish and Wildlife Service. After acquisition, the Secretary of the Interior withdrew his support for the project, the U.S. Soil Conservation Service withdrew its participation, the federal project collapsed, and the land was retained by the United States. A portion of the project was subsequently built with only state and local funds. See, *National Wildlife Federation v. Alexander*, 613 F2d 1054 (D.C. Cir. 1979).

[10] The dispute led to litigation. The United States District Court declared that appropriate acreage credit must be given for the land conveyed to and retained by the United States. *Board of Directors, Garrison Diversion Conservancy District v. Andrus*, A2-80-22 (D.ND March 18, 1981).

[11] An extract from the form conveyance (used prior to 1976) is quoted at p. 6a.

[12] United States of America v. Welte, No. C2-81-49 (D.N.D.)

The federal-state disputes led to a two-year legislative review of the state policy concerning federal land acquisitions in North Dakota.[13] The legislative review, in turn, led to a major shift in state policy. Legislation was enacted which:

1. Withdrew unconditional consent to federal refuge acquisitions under the Migratory Bird Conservation Act.[14]

2. Established procedures for public participation in the decision-making process concerning federal fee and easement acquisitions.[15]

3. Placed certain limitations on easements acquired by the United States with moneys from the Migratory Bird Conservation Fund.[16]

4. Provided that state consent to federal acquisitions for migratory bird refuges would be nullified if the Department of the Interior did not "agree to and comply with" the limitations placed upon easement acquisitions.[17]

5. Limited all easements in North Dakota to 99 years and required that all easements "shall be properly described".[18]

Passage of the 1977 legislation evoked an immediate critical response by federal officials and others. Subsequent discussions between state and federal officials, however, were unproductive and the Secretary of the Interior terminated the waterfowl production area easement program in North Dakota. This coincided with a policy statement by the Governor of North Dakota:

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[13] Senate Concurrent Resolution 4048, 1975 North Dakota Session Laws.

[14] The conditional consent was later suspended until December 31, 1983. See; §20.1-02-18.3, *infra* at p. 5a. See also §20.1-02-18, *infra*, at p. 2a.

[15] See §20.1-02-18.1, *infra*, at p. 2a.

[16] See §20.1-02-18.2, *infra*, at p. 4a.

[17] See §20.1-02-18.2, *infra*, at p. 4a.

[18] See §47-05-02.1, *infra*, at p. 5a.

"I will not approve further wetlands acquisitions by the Fish and Wildlife Service, pursuant to 16 U.S.C. §715k-5, until all mitigation and enhancement lands are acquired for the Garrison Diversion Unit.[19]"

The United States filed its complaint for declaratory relief on May 30, 1979. The case was submitted to the United States District Court by cross-motions for summary judgment. The United States contended that the 1977 laws were unconstitutional insofar as they interferred with the federal acquisition of land (or interests therein) and that the Governor had consented to the federal acquisition of waterfowl production areas. The State defended the constitutionality of the 1977 laws and argued that any gubernatorial consent[20] to federal waterfowl production area acquisition had been withdrawn.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. Introduction

State sovereignty is diminished with each additional federal acquisition of private land. States cannot tax federally owned land.[21] States have limited control over wildlife which uses

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[19] The Garrison Diversion Unit was authorized by the Flood Control Act of 1944 (58 Stat. 887) and "confirmed and approved" in 1965 (79 Stat. 433). Documents supporting the 1965 Act contemplated the acquisition of 146,530 acres of mitigation and enhancement lands for the Garrison Diversion Unit. Although the 146,530 acres had been identified prior to the 1965 Act, the Fish and Wildlife Service unilaterally selected other lands for acquisition within the past several years.

[20] Nearly carte blanche gubernatorial consent had been given in 1961. One issue addressed the continuing validity of that consent.

[21] *McGroom v. Scales*, 76 U.S. 23 (1870).

federally-owned land as a refuge.[22] And, among other things, certain federally owned or controlled land is closed to many normal pursuits of a state's citizens.[23]

Notwithstanding these considerations, the State of North Dakota and other states have willingly participated in numerous federal land acquisition programs. For example, North Dakota has, since the passage of the 1929 Migratory Bird Conservation Act and subsequent related acts, consented to the federal acquisition of over one million fee and easement acres.

The amiable federal-state "partnership", however, ceased in the 1960's when the Department of the Interior initiated a crash land acquisition program and breached a number of long-standing agreements with the State. The State, in response to the adverse federal actions, modified its policy toward the free-wheeling acquisition programs and enacted the laws summarized at page 8.

The United States, alleging that North Dakota was attempting to "interfere" with a federal program, challenged the constitutionality of the state laws *and* attempted to limit the state's ability to participate in the decision making related to the federal acquisition process. Unfortunately, the federal challenge has been successful.

The decisions below constitute a judicial impediment to the State's participation in the decision-making process involving the federal acquisition of certain private lands — a process which has developed during recent decades to accomodate the delicate state-federal balance in our governmental system. Further, the decisions inject uncertainty into the validity of future acquisitions in other states with moneys from the Migratory Bird Conservation Fund, if a state's governor has not

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[22] *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

[23] See e.g., The National Wildlife Refuge System, 50 CFR §25.11 *et seq.*

approved the acquisitions. These matters are fundamental federal-state issues which should be addressed by this Court.

II. The Approval of the Governor (or appropriate State agency) is necessary for federal acquisition of a waterfowl production area and the State can deny, revoke, qualify or condition such approval

A. The Requirement for Governor's Consent.

The federal-state partnership concerning land acquisitions for migratory waterfowl was reaffirmed in 1961 when Congress stated that:

> ... No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency.[24]

The 1961 gubernatorial consent provision was, by a quirk of fate, codified as 16 U.S.C §715k-5 (the Migratory Bird Conservation Act was codified as 16 U.S.C. §715 *et seq.*). This unfortunate placement confused both lower courts and led them to the following erroneous conclusion.

1. The 1961 gubernatorial consent provision was codified 16 U.S.C. §715k-5; therefore it must be a part of the Migratory Bird Conservation Act, 16 U.S.C. §715 *et seq.*[25]

2. The 1958 law provides that waterfowl production areas "may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act"; therefore,

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[24] See fn. 4, *supra.*

[25] The United States District Court stated, for example, that "[b]eing a subsection of §715k, §715k-5 necessarily relates back to the original enactment." See p. 14a, *infra.*

waterfowl production areas may be acquired without gubernatorial consent.[26]

The underlying assumption of the Courts was that Pub. L. 87-383 (containing the 1961 gubernatorial consent provisions) somehow amended or became a part of the 1929 Migratory Bird Conservation Act. Under guidelines established by this Court, Pub. L. 87-383 cannot be considered an amendment of supplement to the Migratory Bird Conservation Act merely because "§715k-5" was assigned in the codification process.[27] *Nashville Milk Company v. Carnation Company*, 355 U.S. 373, reh. den., 355 U.S. 967 (1958); *United States v. Welden*, 377 U.S. 95, 98 at fn. 4 (1964). Further, the lower courts ignored other rules of statutory construction by disregarding the plain meaning[28] of the gubernatorial consent requirement; by overlooking the

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[26] The Court of Appeals concluded that (p. 26a, infra):

> . . . The section of the Stamp Act which authorizes the Secretary of the Interior to acquire waterfowl production areas also provides that they "may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act." 16 U.S.C. §718d(c). *The paramount requirements of that Act are those which condition land acquisitions on state and gubernatorial consent. 16 U.S.C §§715f and 715k-5. If the language in the* [1958 Amendments to the] *Stamp Act exempting waterfowl production areas from the limitations and requirements of the* [1929] *Conservation Act is to have any meaning, it must be read as permitting the acquisition of those areas without the consent requirements* [of the 1961 Act]. To find otherwise is simply to ignore the unambiguous language of the Stamp Act. [Emphasis and editorial clarification added].

[27] An explanatory note to 16 U.S.C.S. 715k-5 states: "This section was not enacted as part of the 'Migratory Bird Conservation Act' which comprises that subchapter." The text of 16 U.S.C.A. §715 states: Sections 715 to 715d, 715e, 715f to 715k and 715l to 715r of this title shall be known by the short title of 'Migratory Bird Conservation Act".

[28] *Consumer Product Safety Commission v. GTE Sylvania, Inc.*____U.S.____, 100 S. Ct. 2051, 2056 (1980); *Caminetti v. United States*, 252 U.S. 470, 485 (1917).

clear legislative intent;[29] by dismissing the rule that, when two statutes are capable of co-existence, courts are to regard each as effective absent a clearly expressed Congressional intention to the contrary;[30] by failing to recognize the longstanding practice of the Secretary to secure the governor's consent,[31] and by displaying insensitivity to the delicate balance between state and federal authority.[32]

Accordingly, the lower courts erroneously concluded that States are to be excluded from the decision-making process in further federal acquisitions of waterfowl production areas.

B. The Governor's approval can be conditioned, modified or withdrawn.

The disputes between the state and federal government (p. 6, supra) caused Governor Link to withdraw any existing approval for future acquisitions. The United States responded with the argument that any previous gubernatorial approvals were etched in stone and could not be rescinded or modified. Unfortunately, again, the lower courts agreed with the United States.[33]

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[29] *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

[30] *Administrator, Federal Aviation Administration v. Robertson*, 442 U.S. 255, 266 (1975); *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

[31] *E.I. du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54 (1977); *NLRB v. Bell Aerospace Co. Division of Textron, Inc.*, 416 U.S. 267, 274 (1974).

[32] *Palmer v. Commonwealth of Massachusetts*, 308 U.S. 79, 83 (1939).

[33] The Court of Appeals said:

> [Gubernatorial consent] is clearly present here and cannot be revoked. To permit revocation would inject intolerable uncertainty into conservation planning and policy. It would subject every acquisition to the whim of changing state governments. [See pp. 27a, *infra*.]

The lower Courts, in effect, declared that the United States could freely breach solemn agreements with the State and mistreat the citizens therein, but the State is powerless to respond.

III. The Challenged State Laws are a Constitutional Limitation on Federal Acquisitions

The District Court declared that "the United States preempted the field of regulating migratory birds";[34] the Court of Appeals concurred. The lower courts therefore concluded that State laws concerning land acquisition could not hinder or frustrate unlimited federal land acquisition for the benefit of migratory waterfowl.[35]

The Court's decisions contain an all-or-nothing irony for states: states may completely reject refuge acquisitions (16 U.S.C. §715f) and governors may completely deny acquisitions with moneys from the Migratory Bird Conservation Fund (16 U.S.C. §715k-5), but states cannot enact general property laws which indirectly affect a federal land acquisition program. Unfortunately, the lower courts completely missed the issue: what are the respective rights of the United States and North Dakota under the federal-state partnership mandated by federal law? The United States claims that State law cannot hinder the unlimited acquisitions of land (or interests therein) and that the State cannot deny, revoke, qualify or condition acquisition approvals. In effect, the United States claims that no partnership exists.

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[34] p. 12a, *infra.*

[35] This Court has consistently declared that "property ownership is not governed by a general federal law, but rather by the laws of the several states" in our federal system. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). However, State law cannot *retroactively* abrogate the terms of written agreements concerning property made by the United States. *Little Lake Misere Land Co. v. United States*, 412 U.S. 580 (1973). The North Dakota laws before this Court have only prospective application.

The State responds that State law shall govern all future conveyances, including acquisitions of land with moneys from the Migratory Bird Conservation Fund—or the State approval for future acquisitions is withdrawn. In effect the State maintains that the State is an equal partner in the federal-state relationship.

Had the Court of Appeals analyzed the challenged state laws, the Court would have discovered a compatibility with the federal acquisition program.[36] The challenged laws do not have the retroactive confiscatory aspects of the 1940 Louisiana law examined in *Little Lake Misere Land Co. v. United States,* 412 U.S. 580 (1973). They do encourage a public participation in the acquisition decision-making process. They do facilitate the habitat acquisition program by limiting easements to 99 years (perpetual easements are now abhored by the state and landowners). And, the challenged laws serve legitimate and important state interests by protecting landowners from fraudulent acquisition practices. These factors will be shown in the following brief description of the laws.

One "unconstitutional" limitation is the 1977 state law[37] which prospectively placed a 99 year time limit upon all easements.[38] Under the statute, the United States could acquire a century-long waterfowl production area easement. If necessary,

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[36] The Court of Appeals, however, ignored this necessary balancing process when it declared that the several North Dakota laws "are impermissible" (p. 30a, infra). The Court of Appeals curtly ruled that "State legislation which hinders or frustrates [federal statutes which preserve natural waterfowl habitat] violates the Supremacy Clause Art. VI Cl. 2 and cannot stand" (p. 29a, infra).

[37] See, N.D. Cent. Code §47-05-02.1 at p. 5a, *infra.*

[38] Justice Rehnquist objected, in *Little Lake,* to the discriminatory aspects of the 1940 law. 412 U.S. at 607. However, the North Dakota 99 year limitation applies to all easements.

the easement could be reacquired 99 years later; otherwise, the land would be freed for then-current uses. The Secretary of the Interior is not required to secure perpetual waterfowl production area easements pursuant to 16 U.S.C. §718d(c); many limited easements have been secured since 1958. The Secretary merely prefers, however, to secure perpetual easements. *Little Lake* declared that laws of real property are usually governed by the states unless the state laws are "aberrant or hostile". 412 U.S. at 596. A state law *prospectively* limiting *all* easements to 99 years cannot be considered "aberrant or hostile".

A second "unconstitutional" limitation is the 1977 state law[39] which allows landowners to negotiate the terms of an easement to be conveyed to the United States. Although landowners may negotiate the terms of any conveyance, the North Dakota Legislative Assembly restated this right in response to the abuses of the federal land acquisition personnel.

A third "unconstitutional" limitation is the 1977 law[40] which required the United States to submit a detailed impact analysis concerning a proposed acquisition and which mandated a public hearing by county commissioners. This process is a common practice.[41]

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[39] See N.D. Cent. Code §20.1-01-18.2 at p. 4a, *infra*.

[40] See N.D. Cent. Code §20.1-02-18.1 at p. 2a, *infra*.

[41] For example, political subdivisions in Minnesota are routinely consulted concerning proposed acquisitions. An August 12, 1981, letter from the United States Department of the Interior to the State of Minnesota states, in part:

> The U.S. Fish and Wildlife Service has obtained fee options on two tracts of land and easement options for waterfowl management rights on 12 tracts of land under and in compliance with the provisions of Section 4 (c) of the Act of March 16, 1934 (48 Stat. 451), as amended. All of these tracts, both fee and easement, have been certified in writing for acquisition by the respective county commissioners — descriptions of these tracts are shown on the attached composite lists.
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> Pursuant to Minnesota Statute 1949, Section 1.041, and the requirement of the before-designated Act, consent of the State for the acquisitions by the United States is hereby requested.

Appendix

APPENDIX

TABLE OF CONTENTS

Page

Constitutional Provisions, Federal Statutes and State Statutes. 1a

Extract From Form Easement Conveyance 6a

Memorandum and Order (Filed June 4, 1980). 8a

Order (Filed June 24, 1980). 14a

Judgment (Filed July 14, 1980) 16a

Opinion, U.S. Courts of Appeals (Filed June 3, 1981). 18a

Order Denying Petition for Rehearing. 32a

Notice of Appeal to the Supreme Court of the United States 33a

Proof of Service for Notice of Appeal 34a

A fourth "unconstitutional" limitation is the 1977 state law[42] which repealed the 1931 unconditional consent to federal refuge acquisitions and which granted conditional consent (i.e., consent if the United States complied with the negotiation requirement and the public involvement process) to future acquisitions.

These common-sense statutes are a legitimate state response to a serious problem. The statutes should not be considered, by a reasonable person, "aberrant or hostile".

IV. The Questions Presented are Substantial

The decisions of the lower courts have destroyed an essential federal-state partnership. The lower courts have declared that this unique federal-state partnership, which was established in 1929 and enhanced in 1961, is "aberrant or hostile" because it hinders unfettered land acquisitions in a state which has, until now, assisted with the federal acquisition of land (or interests therein) for the benefit of migratory waterfowl. The decisions, therefore, upset the delicate balance of rights between the federal government and state governments in a nationwide federal land acquisition program.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

ROBERT O. WEFALD,
ATTORNEY GENERAL
STATE OF NORTH DAKOTA

Murray G. Sagsveen
Special Assistant Attorney General
Zuger & Bucklin
P.O. Box 1695
Bismarck, ND 58502

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[42] See N.D. Cent. Code §20.1-02-18 at p. 2a, *infra*.

CONSTITUTIONAL PROVISIONS, FEDERAL STATUTES AND STATE STATUTES

U.S. Const. Art. VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land...

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16 U.S.C. §718d:

> All moneys received for [federal migratory bird hunting and conservation] stamps shall be... paid into the Treasury of the United States, and shall be reserved and set aside as a special fund to be known as the migratory bird conservation fund, to be administered by the Secretary of the Interior...
>
> * * *
>
> (b) Except as authorized in subsection (c) of this section, [moneys in the migratory bird conservation fund] shall be available for the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under the provisions of the Migratory Bird Conservation Act and for the administrative costs incurred in the acquisition of such areas.
>
> (c) The Secretary of the Interior is authorized to utilize funds made available under subsection (b) of this section for the purpose of such subsection . . . or of this subsection, to acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange of, small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto. Such small areas, to be designated as "Waterfowl Production Areas," may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act...

16 U.S.C. §715k-5:

... No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency.

North Dakota Century Code §20.1-02-18:

State's conditional consent to United States' acquisitions of areas for migratory bird reservations — State retains jurisdiction — North Dakota consents, subject to the conditions of sections 20.1-02-18.1 and 20.1-02-18.2, to the United States acquiring, by purchase, gift, devise, or lease, land or water in this state as the United States may deem necessary to establish migratory bird reservations in accordance with the federal Migratory Bird Conservation Act [Pub. L. 70-770; 45 Stat. 1222; 16 U.S.C. 715 et seq.]. North Dakota reserves such full and complete jurisdiction and authority over all such areas of land or water so acquired by the United States as is not incompatible with the administration, maintenance, protection, and control of such areas by the United States under the terms of said Act of Congress.

[Chapter 204, §1, 1977 North Dakota Session Laws]

North Dakota Century Code §20.1-02-18.1:

Federal wildlife area acquisitions — Submission to county commissioners, opportunity for public comment, and impact analyses required. The governor, the game and fish commis-

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sioner, or their designees, responsible under federal law for final approval of land, wetland, and water acquisitions by the United States department of the interior, its bureaus or agencies, for waterfowl production areas, wildlife refuges or other wildlife or waterfowl purposes, shall submit the proposed acquisitions to the board of county commissions of the county or counties in which the land, wetland, and water areas are located for the board's recommendations. An affirmative recommendation by the board must be obtained prior to final approval of all such proposed acquisitions, whether by transfer of title, lease, easement or servitude.

The board of county commissioners of the county affected, or a designee or designees of the board, shall, within twenty-one days of receipt of an acquisition proposal, physically inspect the proposed acquisition areas. The board shall give public notice of the date, hour, and place where the public may comment on the proposed acquisitions. The notice shall be published once each week for two successive weeks in the official newspaper of the county or counties in which the land and water areas are located. The notice shall set forth the substance of the proposed action, and shall include a legal description of the proposed acquisitions. The board of county commissioners shall make its recommendations within sixty days after receipt of an aquisition proposal.

A detailed impact analysis from the federal agency involved shall be included with the acquisition proposal for board of county commissioner consideration in making recommedations. Such analysis shall include, but shall not be limited to, the recreational and wildlife impacts. In addition, the county agent of the affected county or counties shall prepare an impact analysis for board of county commissioner consideration which shall include the fiscal, social, and agricultural impacts of the proposed acquisitions. The department of the interior shall reimburse the county or counties for any expenses in-

curred by the county agent in preparing the analysis. The analyses shall also be forwarded to the state federal aid coordinator office which shall furnish copies to all interested state agencies and political subdivisions, which agencies and political subdivisions shall have thirty days to review the analyses and return their comments to the state federal aid coordinator office. Upon expiration of the thirty-day period, all comments received by the state federal aid coordinator office shall be forwarded to the federal agency involved and to the state official or agency responsible for final acquisition approval. The federal agency may, after consideration of such comments, file a final impact analysis with the governor, the board of county commissioners, and any other state official or agency responsible for final acquisition approval.

[Chapter 553, §11, 1979 North Dakota Session Laws]

North Dakota Century Code §20.1-02-18.2:

Negotiation of leases, easements, and servitudes for wildlife production purposes. — A landowner may negotiate the terms of a lease, easement, or servitude for land, wetland, or water areas sought to be acquired by the United States department of the interior, its bureaus or agencies, with moneys from the migratory bird conservation fund [16 U.S.C. 718d] for use as waterfowl production areas, wildlife refuges, or for other wildlife purposes. A landowner may:

1. Negotiate the time period of the lease, easement, or servitude being sought.
2. Restrict a lease, easement, or servitude by legal description to the land, wetland, or water areas being sought, and may drain any after-expanded wetland or water area in excess of the legal description in the lease, easement, or servitude.

Failure by the department of the interior, its bureaus or agencies, to agree to and comply with the above provisions shall nullify North Dakota's consent to the federal Act under section 20.1-02-18.

[Chapter 204, §3, 1977 North Dakota Session Laws; Chapter 258, §1, 1981 North Dakota Session Laws]

North Dakota Century Code §20.1-02-18.3:

Suspension of federal authority to acquire interests in land. Notwithstanding the provisions of section 20.1-02-18, or any other provision of law, the United States shall not acquire by any means any land or interests in land for migratory bird reservations, and the governor shall not approve the acquisition of any land or interests in land with moneys from the migratory bird conservation fund until December 31, 1983, or until the date a management plan for such land is approved by both the legislative assembly and the governor, whichever date is first. The management plan shall be jointly prepared by the secretary of the interior and the governor and shall address the extent and general locations of all proposed acquisitions with moneys from the migratory bird conservation fund, the management of all such lands whether already acquired or to be acquired, and the relationship of all such acquisitions to mitigation acquisitions for federally financed or permitted projects.

[Chapter 258, §2, 1981 North Dakota Session Laws]

North Dakota Century code §47-05-02.1:

Regulations governing easements, servitudes, or nonappurtenant restrictions on the use of real property. — Real property

easements, servitudes, or any nonappurtenant restrictions on the use of real property, which become binding after July 1, 1977, shall be subject to the regulations contained in this section. These regulations shall be deemed a part of any agreement for such interests in real property whether or not printed in a document of agreement.

1. The area of land covered by the easement, servitude, or or nonappurtenant restriction on the use of real property shall be properly described, and shall set out the area of land covered by the interest in real property.

2. The duration of the easement, servitude, or nonappurtenant restriction on the use of real property shall be specifically set out, and in no case shall the duration of any interest in real property regulated by this section exceed ninety-nine years.

3. No increase in the area of real property subject to the easement, servitude, or nonappurtenant restriction shall be made except by negotiation between the owner of the easement, servitude, or nonappurtenant restriction and the owner of the servient tenement.

[Chapter 426, § 1, 1977 North Dakota Session Laws]

Extract From Form Easement Conveyance (used prior to 1976)

WHEREAS, section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended by section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., sec. 718d(d)), authorizes the Secretary of the Interior to acquire small wetland or pothole areas suitable for use as waterfowl production areas:

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas:

NOW, THEREFORE, for and in consideration of the sum of ($) Dollars, the parties of the first part do hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made with months of the execution of this indenture by the parties of the first part, or any subsequent date as may be mutually agreed upon during the term of this option, a permanent easement (in perpetuity) or right of use for the maintenance of the land described below as a waterfowl production area, including the right of access thereto by authorized representatives of the United States:

Subject, however, to all existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, cable lines, and all outstanding mineral rights.

The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or recurring due to natural causes on the above-described tract, by ditching or any other means; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter recurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
vs.	)	A1-79-62
	)	
State of North Dakota,	)	
	)	FILED
Defendant.	)	June 4, 1980

MEMORANDUM AND ORDER

By its complaint the Plaintiff challenges various North Dakota statutes which it contends are void under the supremacy clause of the United States constitution. Jurisdiction is asserted under 28 U.S.C. §1345.

In essence, the Plaintiff seeks a judicial declaration that a permanent waterfowl easement acquired by it under the provisions of Section 4 of the Migratory Bird Hunting Stamp Act (16 U.S.C. §718d (c)) is a valid conveyance of an interest in real property under federal law and vests in the United States the rights therein stated, notwithstanding that the conveyance of such a property right is not permitted under Sections 20.1-02-18, 20.1-02-18.1, 20.1-02-18.2, and 47-05-02.1 of the North Dakota Century Code 28 U.S.C. §2201.

On March 17, 1980, oral argument was presented on the parties' cross motions for summary judgment. At that time, and at the suggestion of the Court, the parties agreed to reduce certain matters to a written stipulation; this document was filed March 25. That stipulation provides, *inter alia,* that the Court

has been provided all evidentiary material necessary to resolve the cross motions for summary judgment and that no further evidence will be submitted in connection with the issues raised by Plaintiff's complaint; that the parties agree that the issues raised in Plaintiff's complaint and those raised by the Defendant in its counterclaim may be considered separately by the Court and that those matters raised by the counterclaim will not be considered for disposition until after such time as the Plaintiff's reply or other proper response to the merits of the counterclaim is due: and that the parties reserve the right to file final briefs with regard to the issues presented by Plaintiff's complaint. (Final briefs concerning the complaint have been filed; Plaintiff has responded to Defendant's counterclaim with a motion to dismiss for lack of jurisdiction. By its counterclaim, the Defendant seeks injunctive relief from Plaintiff's alleged threat to utilize its power of eminent domain in the acquisition of certain lands.)

So much of Section 718d, Title 16, United States Code, as is here applicable is set forth:

"§718d. Disposition of receipts from sale of stamps. All moneys received for such stamps shall be accounted for by the Postal Service or the Department of the Interior, whichever is appropriate, and paid into the Treasury of the United States, and shall be reserved and set aside as a special fund to be known as the migratory bird conservation fund, to be administered by the Secretary of the Interior. All moneys received into such fund are appropriated for the following objects and shall be available therefor until expended:

(a) * * * * * (not pertinent) * * * * *

(b) *Except as authorized in subsection (c) of this section,* the remainder shall be available for the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under the provisions of the Migratory Bird Conservation Act and for the administrative costs incurred in the acquisition of such areas. (Emphasis supplied.)

(c) The Secretary of the Interior is authorized to utilize funds made available under subsection (b) of this section for the purposes of such subsection, or of this subsection, to acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange of, small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto. *Such small areas, to be designated as 'Waterfowl Production Areas', may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act,* but all of the provisions of such Act which govern the administration and protection of lands acquired thereunder, except the inviolate sanctuary provisions of such Act, shall be applicable to areas acquired pursuant to this subsection." (Emphasis supplied.)

As stated above, the gravamen of Plaintiff's complaint is directed to the acquisition of an interest in real property under subsection 718d(c) of Title 16, U.S.C.

Defendant asserts that any acquisition by the Plaintiff under §718d (c) of Title 16, U.S.C. is limited by and conditioned upon certain provisions of the Migratory Bird Conservation Act, § 715 et seq., Title 16, United States Code. Specifically, the Defendant argues that § 715f., which provides that

"No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715 to 715d, 715e, 715f to 715k and 715l to 715r of this title unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State."

and § 715k-5., which states, in pertinent part, that

"... No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency."

apply as limitations upon acquisition attempted under Section 718d(c). Further, the Defendant contends that since the State of North Dakota has given only a conditional consent to acquisi-

tions by the United States for migratory bird reservations (20.1-02-18, NDCC); that certain procedural steps must be followed in making such acquisition (20.1-02-18.1, NDCC); that a lease, easement or other servitude upon areas acquired by the United States with moneys from the migratory bird conservation fund for use as waterfowl production areas, wildlife refuges, or for other wildlife purposes terminates upon the death of landowner or upon change of ownership, and that failure by the Plaintiff to comply with this provision nullifies North Dakota's consent under 20.1-02-18 (20.1-02-18.2, NDCC); and that no easement or other servitude on real property which becomes binding after July 1, 1977, shall exceed ninety-nine years in duration (47-05-02.1, NDCC), and that since these state statutory provisions have not or will not be complied with or accepted by the Plaintiff, no valid acquisition of "small wetland and pothole areas" under §718d (c) can be made by the United States.

The provisions requiring consent by the State and approval of the Governor (or appropriate State agency) are found in the language of the Migratory Bird Conservation Act, Title 16, U.S.C., § 715 et seq. No similar provision is to be found in the Migratory Bird Hunting Stamp Act, Title 16, U.S.C., § 718 et seq. The fact that acquisitions made under both the Migratory Bird Conservation Act (Section 715 et seq.) and the Migratory Bird Hunting Stamp Act (Section 718 et seq.) are ultimately paid for from the same migratory bird conservation fund does not nullify the explicit exception incorporated in Section 718d (c) that small, waterfowl production areas *"may be acquired without regard to the limitations and requirements of . . . "* Section 715 et seq. (Emphasis supplied.) It is obvious that State and gubernatorial consent are encompassed within the "limitations and requirements" therein addressed. Therefore, I conclude that neither State nor gubernatorial consent is a prerequisite for a valid acquisition by the United States of small, waterfowl production areas under Section 718d (c) of Title 16, United States Code.

Article II, § 2 of the Constitution of the United States expressly delegates the treaty making authority to the President by and with the consent of the Senate. Article VI, Clause 2 of the Constitution provides, *inter alia,* that all treaties made under the authority of the United States shall be the supreme law of the land, any state law to the contrary notwithstanding.

By treaties concluded with Great Britian on August 16, 1916 (39 Stat. 1702) and Mexico on February 7, 1936 (50 Stat. 1311) the United States preempted the field of regulating migratory birds. Subsequent Congressional enactments (Sections 703 et seq., Title 16, United States Code) have delineated the United States' role in the protection and regulation of those creatures. The validity of the treaty with Great Britian, and statutes promulgated thereunder, has been upheld. *Missouri v. Holland,* 252 U.S. 416 (1920).

A state law which either frustrates the purpose of federal legislation or impedes the operation of the federal agency charged with superintending a preempted field cannot stand. *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967). Even though a federal statute does not specifically exclude state legislation, it nevertheless overrides those state laws with which it conflicts. *Chicago-Midwest Meat Association v. City of Evanston,* 589 F. 2d 278 (7 Cir. 1978), cert. den. 442 U.S. 946.

Under the circumstances of this case, I conclude that the challenged North Dakota statutes, insofar as they conflict with the federal scheme for land acquisitions under Section 718d (c) of Title 16, United States Code, stand as an obstacle to the accomplishment and execution of valid purposes and objectives of Congress. For that reason, and to that extent, they must yield to the overriding federal law.

Turning now to the matter of the pending motion to dismiss Defendant's counterclaim, I find no basis for subject matter jurisdiction. Two of the jurisdictional grounds advanced by

Defendant — the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Declaratory Judgment Statute, 28 U.S.C. §§ 2201 & 2202 — are purely procedural and remedial in nature, and provide no independent jurisdictional basis in this Court. The third ground advanced, the Federal Question Statute (28 U.S.C. § 1331) merely defines the general parameters of federal district court jurisdiction. Standing alone, Section 1331 does not constitute a consent to suit against the United States.

For the reasons above stated, it is

ORDERED that Defendant's motion for summary judgment be, and the same hereby is, in all things, *denied.* It is further

ORDERED that Plaintiff's motion for summary judgment be, and the same hereby is, in all things, *granted.* And it is further

ORDERED that Plaintiff's motion to dismiss defendant's counterclaim, together with the related motion for preliminary injunction be, and the same hereby is, in all things, *granted.*

Counsel for the Plaintiff will forthwith prepare and submit an appropriate form of judgment in conformity herewith.

Bismarck, North Dakota, this 4 day of June, 1980.

Bruce M. Van Sickle, *Judge*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
vs.	)	A1-79-62
	)	
State of North Dakota,	)	
	)	FILED
Defendant.	)	June 24, 1980

ORDER

Defendant has moved for relief under Rule 60 (b), Federal Rules of Civil Procedure, from that memorandum and order dated and entered June 4, 1980, and for a stay pending disposition of the motion for relief or, in the alternative for a stay pending appeal. In connection with both motions, the Defendant requests oral argument.

Concerning the motion for relief, the movant asserts that the Court is in error in stating that gubernatorial approval of land acquisitions is found only in the Migratory Bird Conservation Act and *not* in the Migratory Bird Hunting Stamp Act. It contends that since §715k-5 (the provision requiring consent) is not included in those sections enumerated in §715 of Title 16, United States Code, it must be specifically excluded and not within the Migratory Bird Conservation Act. I disagree. §715k *is* included in those sections set out in §715. The fact that §715k-5 is not described in §715 is accounted for by the fact that it (§715k-5) was not enacted until some thirty years after §715. Being a subsection of §715k, §715k-5 necessarily relates

back to the original congressional enactment. Therefore, my conslusion that §715k-5 is a part of the Migratory Bird Conservation Act stands.

Movant also challenges the Court's determination that no independent ground is pleaded or shown for subject matter jurisdiction of Defendant's counterclaim. The authority it cites in support of its motion, *Jaffee v. United States,* 592 F.2d 712 (3d Cir.), cert. den. 441 U.S. 961, simply holds that "under some circumstances" the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702, resulted in a waiver of immunity from suit. That Court (the Third Circuit) recognized that a dispute might exist as to what those "circumstances" might be that would justify such a waiver, and specifically disagreed with a prior holding of the Second Circuit wherein it was held that the 1976 amendment did *not* result in a waiver of immunity from suit under the federal question statute, 28 U.S.C. §1331. Again, I disagree with movant's reasoning.

Now Therefore, the Court having considered the pending motions, together with briefs and other pertinent file documents, and being well and sufficiently advised in all the premises, it is

ORDERED that Defendant's request for oral argument on the pending motions is *denied;* and it is further

ORDERED that Defendant's motion for relief under Rule 60 (b) be, and the same hereby is, in all things, *denied;* and it is further

ORDERED that Defendant's motion for stay pending appeal be and the same hereby is, *granted.*

Bismarck, North Dakota, this 23day of June, 1980.

Bruce M. Van Sickle, *Judge*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CIVIL NO. A1-79-62
	)	
State of North Dakota,	)	
	)	FILED
Defendant.	)	July 14, 1980

JUDGMENT

The above-entitled action having been commenced by the Plaintiff, United States of America, under the provisions of Title 28 U.S.C. Section 1345, against the Defendant, the sovereign State of North Dakota, the Plaintiff, United States of America, having sought judgment pursuant to 28 U.S.C. Section 2201 declaring that Sections 20.1-02-18, 20.1-02-18.1, 20.1-02-18.2, and 47-05-02.1 of the North Dakota Century Code are unconstitutional and thus void and unenforceable; the Defendant having filed a counterclaim which the Plaintiff, United States of America, moved to dismiss for lack of jurisdiction; the Plaintiff, United States of America, having moved for summary judgment on its complaint on a stipulated record; and the Court having granted the Plaintiff, United States of America's motion for summary judgment, on its complaint and its motion to dismiss the counterclaim, and the Court having filed its Memorandum and Order on June 4, 1980, finding that a case and controversy exists between the parties under Article III of the United States Constitution and that the Court had juris-

diction of both the parties and the subject matter as to the Plaintiffs complaint, that no material issue of fact remains to be tried, and that Sections 20.1-02-18, 20.1-02-18.1, 20.1-02-18.2, and 47-05-02.1 of the North Dakota Century Code are hostile to a valid congressionally authorized federal program, and beyo. any consent authority granted to the State of North Dakota by Congress; now, therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Sections 20.1-02-18, 20.1-02-18.1, 20.1-02-18.2, and 47-05-02.1 of the North Dakota Century Code are unconstitutional under the supremacy clause of the United States Constitution and are, therefore, void and unenforceable insofar as they purport to regulate the terms, conditions, or use of acquisitions of land, or interests therein, by the United States of America under the Migratory Bird Hunting Stamp Act (Duck Stamp Act), 16 U.S.C. Section 718, et seq., as amended;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that small wetland and pothole areas, interests therein, and rights of way to provide access thereto acquired by the United States of America pursuant to 16 U.S.C. Section 718d (c) are not subject to the limitations and requirements of the Migratory Bird Conservation Act, specifically 16 U.S.C. Section 715f and 16 U.S.C. Section 715k-5;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, State of North Dakota's, counterclaim be and hereby is dismissed for lack of jurisdiction.

Dated this 14 day of July, 1980.

Bruce M. Van Sickle, *Judge*
United States District Court

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 80-1655

United States of America, Appellee, v. State of North Dakota, Appellant.	* * * * * * *	Appeal from the United States District Court for the District of North Dakota

Submitted: April 15, 1981
Filed: June 3, 1981

Before LAY, Chief Judge, ROSS, Circuit Judge, and ROBINSON,* Senior District Judge.

ROBINSON, Senior District Judge.

This is an action by the United States to declare certain North Dakota statutes null and void because they are at odds with the provisions and purposes of federal statutes which protect migratory birds. The United States also seeks a declaration that the Secretary of the Interior can acquire land in North Dakota for "Waterfowl Production Areas" without obtaining the consent or approval of the Governor. North Dakota filed a counterclaim to enjoin the United States from acquiring land without obtaining additional consent from appropriate state officials.

*Richard E. Robinson, Senior District Judge, District of Nebraska, sitting by designation.

The District Court[1] held that, to the extent they conflict with federal law, the challenged North Dakota statutes are invalid and that gubernatorial consent is not a pre-requisite to the acquisition of waterfowl production areas. North Dakota's counterclaim was dismissed for lack of subject matter jurisdiction. We affirm.

Background

Migratory birds have been protected by treaty and by federal statute for over sixty years. A brief review of that protection lends perspective to this controversy.

On December 8, 1916, President Wilson proclaimed a treaty with Great Britian (on behalf of Canada) 39 Stat. 1702 for the protection of the "many species of birds [which] in their annual migration traverse certain parts of the United States and . . . Canada." *Id.* Subsequent treaties have been signed with other nations to afford migratory birds similar protection.[2] In 1918, Congress passed the Migratory Bird Treaty Act (Treaty Act) 16 U.S.C. §§ 703-711 (original version at Ch. 128, §§ 2-3, 40 Stat. 755). The statute's stated purpose is to implement the treaty between the United States and Great Britian. Generally, it proscribes, subject to regulations issued by the Secretary of Agriculture, the hunting, capture, possession and sale of migratory birds.

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[1] The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota.

[2] Similar agreements have been reached with Mexico, Convention for the Protection of Migratory Birds and Game Mammals, United States-Mexico, Feb. 7, 1936, 50 Stat. 131, Japan, Convention for the Protection of Migratory Birds, United States-Japan, March 4, 1972, 25 U.S.T. 3329, and the Soviet Union, Convention concerning the Conservation of Migratory Birds and Their Environment, United States-Soviet Union, Nov. 19, 1976, T.I.A.S. 9073.

Shortly after its enactment, the Treaty Act was challenged on constitutional grounds. In *Missouri v. Holland*, 252 U.S. 416 (1920) the state argued that the act interfered with its sovereign ownership of the wild game within its borders in violation of the Tenth Amendment. The Court upheld both the treaty and the statute. Writing for the majority, Justice Holmes observed:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any power to deal with.

252 U.S. at 435. *See generally Bailey v. Holland*, 126 F.2d 317, 319-20 (4th Cir. 1942).

In 1929, the Migratory Bird Conservation Act (Conservation Act) 16 U.S.C. § 715 et. seq. was enacted. Complimenting the Treaty Act,[3] it authorizes the Secretary of the Interior to acquire land for inviolate migratory bird sanctuaries but conditions that acquisition on the consent of the state in which the land is lo-

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[3] The Conservation Act was passed for the express purpose of meeting our treaty obligations with Great Britian by "lessening the dangers threatening migratory game birds from drainage and other causes, by the acquisition of areas of land and of water to furnish in perpetuity reservations for the adequate protection of such birds." Chapter 257, 45 Stat. 1222. A section of the current act provides that acquired land "shall . . . be administred by the Secretary of the Interior . . . to conserve and protect migratory birds in accordance with treaty obligations with Mexico, Canada, Japan, and the Union of Soviet Socialist Republics . . ." 16 U.S.C. § 715(i).

cated.[4] 45 Stat. 1222, Sec. 5. *See also United States v. Carmack*, 329 U.S. 230, 241 n.10 (1946). Together, the Treaty Act — in regulating hunting and possession — and the Conservation Act — by establishing sanctuaries and preserving natural waterfowl habitat — help implement our national commitment to the protection of migratory birds.

To fund the acquisition of the migratory bird sanctuaries provided for in the Conservation Act, Congress passed the Migratory Bird Hunting and Conservation Stamp Act (Stamp Act) in 1934.[5] 16 U.S.C. §718 et. seq. The Stamp Act provides that anyone hunting migratory birds is required to purchase a hunting stamp. The revenue generated from the sale of these stamps is placed in a special fund known as the Migratory Bird Conservation Fund which in turn is used to acquire refuge areas.[6]

The Stamp Act also authorizes the Secretary of the Interior to acquire the water fowl production areas which are at issue here.

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[4] The state consent requirement is now found in section 715(f) of the Act:

> No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715 to 715d, 715e, 715f to 715k and 715-1 to 715r of this title unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.

[5] See 48 Stat. 451.

[6] Section 718 provides in pertinent part that:

> All moneys received for such stamps shall be . . . paid into the Treasury of the United States, and shall be reserved and set aside as a special fund to be known as the migratory bird conservation fund, to be administered by the Secretary of the Interior . . .
>
> (a) * * *
>
> (b) Except as authorized in subsection (c) of this section, the remainder shall be available for the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under the provisions of the Migratory Bird Conservation Act and for the administrative costs incurred in the acquisition of such areas.

Waterfowl production areas are described in the statute as "small wetland and pothole areas." These areas, like the refuge areas, are financed throught the Migratory Bird Conservation Fund. Section 718d (c), however, provides that waterfowl production areas may be acquired without complying with the limitations and requirements of the Conservation Act.[7]

In 1961 Congress passed the Wetlands Loan Act 75 Stat. 813. Codified in sections 715k-3 to k-5 of the Conservation Act, it provides for interest free loans to the migratory bird conservation fund but adds the proviso that no land can be acquired with moneys from the fund unless the acquisition is approved by the governor or by an appropriate state agency.[8]

The statutes highlighted above protect migratory birds, in part, by providing for the acquisition and preservation of their environment. Provision is made to acquire at least two types of habitats, bird sanctuaries and waterfowl production areas, with money from the Migratory Bird Conservation Fund. The Con-

---

[7] Section 718d (c) provides that:

> The Secretary of the Interior is authorized to utilize funds made available under subsection (b) of this section (See note 6 *supra*) for the purposes of such subsection . . . or of this subsection, to acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange of, small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto. Such small areas, to be designated as "Waterfowl Production Areas," may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act . . .

[8] Section 715k-5 provides that:

> Funds appropriated pursuant to sections 715k-3 to 715k-5 of this title shall be treated as an advance, without interest, to the migratory bird conservation fund. Such appropriated funds, beginning on October 1, 1983, shall be repaid to the Treasury out of the migratory bird conservation fund . . . No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency.

servation Act provides that sanctuaries may be acquired only with state consent.[9] *See United States v. 1,216.83 Acres of Land,* 573 F. 2d 1054, 1055 (9th Cir. 1978); *Swan Lake Hunting Club v. United States,* 381 F.2d 238, 242-43 (5th Cir. 1967). A dispute about whether state consent is also required for the acquisition of waterfowl production areas precipated this controversy.

Facts

The Fish and Wildlife Service of the Department of the Interior has acquired over 750,000 acres of permanent easements as waterfowl production areas in North Dakota. All of the acreage has been acquired with the consent of the Governor or an appropriate state official. Approval was obtained from Governor Guy between 1961 and 1964 for the acquisition of acreage in forty-one North Dakota counties and the current Governor, Arthur Link, approved various acreage adjustments between 1973 and 1977. This consent is sufficient to enable the Fish and Wildlife Service to meet its acquisition objectives for waterfowl production areas in North Dakota.

In 1977 North Dakota passed legislation limiting and placing conditions on any further acquisitions by the federal government. Additional acquisitions are now subject to the approval of the board of county commissioners in the county where the land is located. The county agent in the affected county is required to prepare an impact analysis for the county board and the Department of the Interior must reimburse the county for the cost of the analysis. In addition, the affected landowner is permitted to negotiate the terms and duration of the lease or

---

[9] See note 4 *supra.*

easement.[10] North Dakota has also restricted the duration of any lease, easement or servitude to 99 years.[11]

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[10] N.D. CENT. CODE 20.1-02-18 provides in part:

> North Dakota consents, subject to the conditions of sections 20.1-02-18.1 and 20.1-02-18.2, to the United States acquiring, by purchase, gift, devise, or lease, land or water in this state as the United States may deem necessary to establish migratory bird reservations in accordance with the federal Migratory Bird Conservation Act. (citation omitted)

N.D. CENT CODE 20.1-02-18.1 provides:

> *Federal Wildlife area acquisitions-Submissions to county commissioners, opportunity for public comment, and impact analysis required.*-The governor, the game and fish commissioner, or their designees, responsible under federal law for final approval of land, wetland, and water acquisitions by the United States Department of the Interior, its bureaus or agencies, for waterfowl production areas, wildlife refuges or other wildlife or waterfowl purposes, shall submit the proposed acquisitions to the board of county commissioners of the county or counties in which the land, wetland, and water areas are located for the board's recommendations. An affirmative recommendation by the board must be obtained prior to final approval of all such proposed acquisitions, whether by transfer of title, lease, easement, or servitude . . .
>
> A detailed impact analysis from the federal agency involved shall be included with the acquisition proposal for board of county commissioner consideration in making recommendations . . . In addition, the county agent of the affected county or counties shall prepare an impact analysis for board of county commissioner consideration which shall include the fiscal, social and agricultural impacts of the proposed acquisitions. The department of the interior shall reimburse the county or counties for any expenses incurred by the county agent in preparing the analysis. The analyses shall also be forwarded to the state planning division which shall furnish copies to all interested state agencies and political subdivisions, which agencies and political subdivisions shall have thirty days to review the analyses and return their comments to the state planning division. Upon expiration of the thirty-day period, all comments received by the state planning division shall be forwarded to the federal agency involved and to the state official or agency responsible for final acquisition approval.

The federal agency may, after consideration of such comments, file a final impact analysis with the governor, the board of county commissioners, and any other state official or agency responsible for final acquisition approval.

N.D. CENT. CODE 20.1-02-18.2 provides:

Negotiation of leases, easements, and servitudes for wildlife production purposes.—A landowner may negotiate the terms of a lease, easement, or servitude for land, wetland, or water areas sought to be acquired by the United States department of the interior, its bureaus or agencies, with moneys from the migratory bird conservation fund [16 U.S.C. 718d] for use as waterfowl production areas, wildlife refuges, or for other wildlife purposes. A landowner may:

1. Negotiate the time period of the lease, easement, or servitude being sought.
2. Restrict a lease, easement, or servitude by legal description to the land, wetland, or water areas being sought, and may drain any after-expanded wetland or water area in excess of the legal description in the lease, easement, or servitude.

Failure by the department of the interior, its bureaus or agencies, to agree to and comply with the above provisions shall nullify North Dakota's consent to the federal act under section 20.1-02-18.

[11] N.D. CENT. CODE 47-05-02.1 provides in relevant part:

Regulations governing easements, servitudes, or non-appurtenant restrictions on the use of real property. - Real property easements, servitudes, or any non-appurtenant restrictions on the use of real property, which became binding after July 1, 1977, shall be subject to regulations contained in this section. These regulations shall be deemed a part of any agreement for such interests in real property whether or not printed in a document of agreement.

1. * * *

2. The duration of the easement, servitude, or non-appurtenant restriction on the use of real property shall be specifically set out, and in no case shall the duration of any interest in real property regulated by this section exceed ninety-nine years.

The United States seeks a judgment declaring that, to the extent they conflict with the federal policy of protecting migratory birds, these statutes are null and void. A judgment is also sought declaring that waterfowl production areas can be acquired without the consent of North Dakota's Governor.

Gubernatorial Consent and Waterfowl Production Areas.

North Dakota contends that gubernatorial consent is required for the acquisition of waterfowl production areas and that any previous consent has been revoked by Governor Link. The state also points out that it has shifted its policy of giving unconditional approval to federal acquisitions by passing the 1977 amendments to section 20.1-02-18 of the North Dakota Century Code. The linchpin of the state's argument is that gubernatorial consent is in fact required. For this proposition North Dakota relies on section 715k-5 of the Conservation Act which requires state approval for all land acquired with moneys from the migratory bird conservation fund. Since waterfowl production areas are so acquired, North Dakota argues that they are subject to the approval of the Governor.

We disagree. The section of the Stamp Act which authorizes the Secretary of the Interior to acquire waterfowl production areas also provides that they "may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act." 16 U.S.C. §§ 718d (c). The paramount requirements of that Act are those which condition land acquisitions on state and gubernatorial consent. 16 U.S.C. §§ 715f and 715k-5. If the language in the Stamp Act exempting waterfowl production areas from the limitations and requirements of the Conservation Act is to have any meaning, it must be read as permitting the acquisition of those areas without the consent requirements. To find otherwise is simply to ignore the unambiguous language of the Stamp Act.

In this case approval has already been given for the acquisition of enough waterfowl easements to enable the Fish and Wildlife Service to meet its goals for waterfowl production areas in North Dakota. The state claims that this consent has been withdrawn. It argues that by approving acquisitions a Governor does not bind succeeding administrations and as a result the consent of one Governor may be revoked by another. Here it is contended that the county by county approvals given by Governor Guy between 1961 and 1964 did not extend beyond his term of office and that the acreage adjustments approved by Governor Link have been revoked.

While we hold that gubernatorial consent is not required for the acquisition of waterfowl production areas, it is clearly present here and cannot be revoked. To permit revocation would inject intolerable uncertainty into conservation planning and policy. It would subject every acquisition to the whim of changing state governments.

The Fifth Circuit Court of Appeals reached the same conclusion in *Swan Lake supra.* In that case the Governor of Mississippi unconditionally consented to the acquisition of lands to be added to the Yazoo National Wildlife Refuge. When the United States condemned land adjoining the refuge which belonged to the Swan Lake Hunting Club, the Club produced a disclaimer from the Governor to the effect that he had not consented to the acquisition of the land by condemnation or to the acquisition of the hunting rights. Finding that condemnation was permissible under the Conservation Act,[12] the Court rejected the Governor's disclaimer: "In his letter of September 18 Governor Barnett consented . . . to the "purchase" of the "lands" in question; no limitation was placed on this broad language . . . His disclaimer made nearly three years later cannot alter the legal effect of words uttered in 1960." 381 F.2d at 244-45.

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[12] See 381 F.2d at 240-41.

In this case there has been no showing that any of the gubernatorial authorizations which have allegedly been withdrawn contained any contemporaneous reservations or limitations.[13] Accordingly, North Dakota cannot now complain that its prior approvals have been revoked or altered by the sub rosa intentions of the consenting officials.[14]

In short, the Stamp Act explicitly provides that waterfowl production areas may be acquired without state or gubernatorial

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[13] The authorization form for waterfowl easements signed by Governor Guy provide as follows:

> I, William L. Guy, Governor of the State of North Dakota, in accordance with the provisions of the Act of October 4, 1961, 75 Stat. 813, hereby grant approval to the acquisition of easements by the United States of America of any lands within the county of _____, State of North Dakota, for Waterfowl Production Area purposes not to exceed _____ [a specified number of] acres of wetlands.

Designated Record at 47 (Affidavit of William L. Guy ¶5). There are certainly no restrictions in the above language.

North Dakota cites the following statement by Governor Link:

> It is apparent . . . that the policy which I established on April 25, 1978, has been misinterpreted. For this reason, I must restate my policy in order to leave no room for misunderstanding. The policy will be very simple: I will not approve any further wetlands acquisitions by the Fish and Wildlife Service, pursuant to 16 U.S.C. §715k-5, until all mitigation and enhancement lands are acquired for the Garrison Diversion Unit.

Appellants Brief at 11. The policy referred to deals with future acquisitions; it does not even purport to terminate or limit prior acquisitions.

[14] North Dakota directs our attention to the affidavit of Governor Guy in which part provides:

> It was never my intention that the authorization would convey "full and unconditional approval to the Fish and Wildlife Service for the acquisition of . . . waterfowl easements." The authorizations were to be effective until modified or rescinded by me.

Designated Record at 47-48 (affidavit of Governor Guy ¶7). But these reservations were not articulated at the time the authorizations were approved. See note 13 *supra*.

consent. Whether required or not, consent is present here. A coherent waterfowl protection program is possible only when that consent is not subject to the belated conditions and revocations urged by the state.

The Challenged North Dakota Statutes

The United States, through its treaty obligations with other nations, is committed to a policy of protecting migratory birds. That policy is implemented in part by federal statutes which preserve natural waterfowl habitat. State legislation which hinders or frustrates those statutes violates the Supremacy Clause Art. VI cl. 2 and cannot stand. *Nash v. Florida Industrial Comm'n.*, 389 U.S. 235, 240 (1967). *See Little Lake Misere Land Co. v. United States*, 412 U.S. 580, 596-97 (1973).

In *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974) the government sued to enforce a provision in a waterfowl production easement which prohibited draining or ditching on the land in question. The defendants argued that North Dakota law did not allow the specific type of easement conveyed to the United States. In requiring the Albrechts to comply with the terms of the easement, this Court observed that:

> The specific federal governmental interest in acquiring rights to property for waterfowl production areas is stronger than any possible "aberrant" or "hostile" North Dakota law that would preclude the conveyance granted in this case. We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right.

496 F. 2d at 911.

The North Dakot statutes challenged here are clearly hostile to the acquisition of waterfowl production areas by the United States. They place several conditions on the initial acquisitions of waterfowl leases and easements and then set a limit on their duration. Among other things, the statutes require the Department of the Interior to reimburse the county for the cost of its impact analysis; permit landowners to negotiate the time period of leases and easements; and restrict all leases and easements to 99 years.[15] To the extent they encumber the federal statutes which provide for the acquisition of waterfowl habitat, the challenged North Dakota statutes are impermissible and must yield to the overriding national interest in protecting migratory birds.

North Dakota's Counterclaim.

The district court dismissed North Dakota's counterclaim for lack of subject matter jurisdiction. The counterclaim seeks to enjoin further land acquisitions both under the Conservation Act and with moneys from the migratory bird conservation fund without additional state consent. The only factual allegation is that the Fish and Wildlife Service intends to condemn additional land for the Lake Alice National Wildlife Refuge. This allegation is based on a letter to Governor Link from the area wildlife manager which discloses the planned condemnation.

Jurisdiction for the counterclaim is based on federal question 28 U.S.C. §1331, the Declaratory Judgment Act 28 U.S.C. §§2201-2202 and the Administrative Procedure Act, 5 U.S.C. §§701-706. On appeal North Dakota concedes that standing

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[15] See notes 10 and 11 *supra.*

alone section 1331 does not confer jurisdiction.[16] Appellants' Brief at 42. It argues, however, that when 1331 is considered along with section 702 of the APA there is a jurisdictional basis for its suit against the United States.[17] Section 702 provides in part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indespensible party.

Assuming arguendo that North Dakota is correct,[18] the counterclaim was still properly dismissed in light of the relief granted the United States in its case in chief.

In addition, it would seem that under this record North Dakota's request for injunctive relief is premature. There is no allegation that the United States has commenced condemnation proceedings with respect to the Lake Alice area. In fact the letter indicating that suit would be filed also said that "(a)ny counteroffers received . . . will be carefully considered and every effort will be made to reach mutually acceptable agreements if at all possible." Designated Record at 56. We conclude that North Dakota's counterclaim was properly dismissed.

---

[16] There is not serious contention that the declaratory judgment statute confers subject matter jurisdiction. *See Skelly Oil Co. v. Phillip Co.*, 339 U.S. 667, 671-72 (1950).

[17] The general rule, of course, is that the United States as sovereign is immune from suit unless it consents to be sued. *United States v. Testan*, 424 U.S. 392, 399 (1976).

[18] *Compare Watson v. Blumenthal*, 586 F.2d 925 (2nd Cir. 1978) and *Jaffee v. United States*, 592 F. 2d 712, 718-19 cert. denied 441 U.S. 961 (3rd Cir. 1979).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1655 September Term, 1980

United States of America, Appellee, vs. State of North Dakota, Apellant.	)	Appeal from the United States District Court for the District of North Dakota.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 21, 1981

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States of America, Appellee,	)	
vs.	)	No. 80-1655
State of North Dakota, Appellant.	)	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of North Dakota appeals to the Supreme Court of the United States from the Judgment entered in this action on June 3, 1981, and the July 21, 1981, Order which denied the State's Petition for Rehearing.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Dated: September 18, 1981.

ROBERT O. WEFALD
ATTORNEY GENERAL
STATE OF NORTH DAKOTA

MURRAY G. SAGSVEEN
Special Assistant Attorney General
for the State of North Dakota

Zuger & Bucklin
P.O. Box 1695
Bismarck, ND 58502
701/223-2711

PROOF OF SERVICE

I, Murray G. Sagsveen, a Special Assistant Attorney General for the State of North Dakota, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 18th day of September, 1981, I served copies of the Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States by first class postage prepaid to the United States Attorney for the District of North Dakota at P.O. Box 2505, Fargo, North Dakota 58108, and to the Solicitor General, Department of Justice, Washington, D.C. 20044.

2. On the United Stated Department of the Interior by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to William Coldiron, Solicitor, Room 5301, U.S. Department of the Interior, Washington, D.C. 20240.

3. On the National Wildlife Federation, amicus curiae, by mailing a copy, in a duly addressed envelope, with first class postage prepaid, to Thomas Tomasello, National Wildlife Federation, 1412 16th Street, N.W., Washington, D.C. 20036.

Dated: September 18, 1981.

MURRAY G. SAGSVEEN
Special Assistant Attorney General
For the State of North Dakota

Zuger & Bucklin
P.O. Box 1695
Bismarck, ND 58502
701/223-2711

Joint Appendix

Office - Supreme Court, U.S.
FILED
MAY 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF NORTH DAKOTA,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the U.S. Court of Appeals
For The Eighth Circuit

JOINT APPENDIX

ROBERT O. WEFALD
Attorney General
MURRAY G. SAGSVEEN
Special Assistant
Attorney General
ZUGER & BUCKLIN
P.O. Box 1695
Bismarck, ND 58502
(701) 223-2711
Counsel for Appellant

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Appellee

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

APPEAL DOCKETED OCTOBER 19, 1981
PROBABLE JURISDICTION NOTED MARCH 1, 1982

INDEX

		Page
1.	Relevant Docket Entries	1
2.	Consent for Kidder County (dated December 18, 1961; R.9)	3
3.	Summary of Gubernatorial Consents (dated 1961-1977; R.9)	4
4.	Extract from Hearings on H.R. 10714, H.R. 11525, H.R. 11535, H.R. 12143, H.R. 12144 and H.R. 12145 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 88th Cong., 2d Sess. 21 (1962)	6
5.	Extract from Congressional Record; 113 Cong. Rec. 16222 and 16224 (1967)	11
6.	Easement Conveyance Contract (dated August 15, 1977; R.9)	14
7.	Letter from Governor Link to North Dakota Game and Fish Commissioner (dated April 25, 1978; R.5)	18
8.	Letter from Governor Link to Area Manager (dated April 16, 1979; R.5)	21
9.	Appellee's Complaint (filed May 30, 1979; R.1)	29
10.	Affidavit of Governor Link (dated June 18, 1979; R.5)	38
11.	Relevant excerpts from Appellee's Interrogatory Answers (dated July 23, 1979; R.9)	47
12.	Affidavit of Governor Guy (dated August 3, 1979; R.11)	54

13. Affidavit of David Sprynczynatyk (dated February 14, 1980; R.20) 57

14. Appellant's Answer and Counterclaim (filed February 14, 1980; R.16) 64

15. Stipulation (filed March 25, 1980; R.28) 71

16. Order of the United States District Court for the District of North Dakota, dated June 4, 1980, ordering that Appellee's motion for summary judgment be granted .....(J.S. App. 8a-13a)

17. Order of the United States District Court for the District of North Dakota, dated June 24, 1980, denying Appellant's motion for relief and granting Appellant's motion for stay pending appeal ..... (J.S. App. 14a-15a)

18. Judgment entered by the United States District Court for the District of North Dakota, filed on July 14, 1980, in favor of Appellee United States of America and against Appellant State of North Dakota .....(J.S. App. 16a-17a)

19. Opinion of the United States Court of Appeals for the Eighth Circuit, dated June 3, 1981 ..... (J.S. App. 18a-32a; 650 F.2d 911)

20. Order of the United States Court of Appeals for the Eighth Circuit, dated July 21, 1981, denying Appellant's petition for rehearing .....(J.S. App. 32a)

21. Appellant's Notice of Appeal to the United States Supreme Court filed in the United States Court of Appeals for the Eighth Circuit on September 21, 1981 .....(J.S. App. 32a)

22. Relevant Constitutional provisions, laws and regulations:

a. U.S. Const. Art. VI, Cl. 2 74

b. 16 U.S.C. §668dd (1976) 74

c. 16 U.S.C. §715f (1976)..... 80

d. 16 U.S.C. §715k-5 (1976)..... 80

e. 16 U.S.C. §715s(a) (Supp. IV 1980) 81

f. 16 U.S.C. §718d (1976) 82

g. Pub. L. 87-383 83

h. N.D. Cent. Code Ann. §20.1-02-18 ..... (J.S. App. 2a)

i. N.D. Cent. Code Ann. §20.1-02-18.1 ..... (J.S. App. 2a-4a)

j. N.D. Cent. Code Ann. §20.1-02-18.2 ..... (J.S. App. 5a)

k. N.D. Cent. Code Ann. §20.1-02-18.3 ..... (J.S. App. 5a)

l. N.D. Cent. Code Ann. §47-05-02.1 ..... (J.S. App. 5a-6a)

No. 81-773

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF NORTH DAKOTA,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the U.S. Court of Appeals
For The Eighth Circuit

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

Date	No.	Proceeding
1979		
May 30	1	COMPLAINT
June 19	5	MOTION TO DISMISS by State of North Dakota
Aug. 22	13	MOTION FOR SUMMARY JUDGMENT by the United States

1980		
Feb. 6	15	ORDER denying motion to dismiss and ordering a response to the motion for summary judgment
Feb. 14	16	ANSWER and COUNTERCLAIM
Mar. 14	26	MOTION FOR SUMMARY JUDGMENT by State of North Dakota
Mar. 17	27	CLERK'S RECORD OF ORAL ARGUMENTS ON PENDING MOTIONS
Mar. 25	28	STIPULATION, as requested by Judge Van Sickle at March 17, 1980, hearing.
June 4	31	ORDER granting the United States' Motion for Summary Judgment
June 24	35	ORDER denying the state's motion for relief under Rule 60(b) and granting the state's motion for stay pending appeal.
July 14	36	JUDGMENT
July 22	37	NOTICE OF APPEAL

UNITED STATES
DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE
1006 WEST LAKE STREET
MINNEAPOLIS 8, MINNESOTA

Mr. R. W. Burwell, Regional Director
Bureau of Sport Fisheries and Wildlife
U.S. Fish and Wildlife Service
1006 W. Lake St.
Minneapolis 8, Minn.

Dear Sir:

I, William L. Guy, Governor of the State of North Dakota, in accordance with the provisions of the Act of October 4, 1961, 75 Stat. 813, hereby grant approval to the acquisition of easements by the United States of America of any lands within the county of Kidder, State of North Dakota, for Waterfowl Production Area purposes not to exceed 56,282.0 acres of wetlands.

/s/ William L. Guy

December 18, 1961
(date)

SUMMARY OF GUBERNATORIAL CONSENTS

County	Date	Signator*	Acreage (Gov. Guy)	Acreage (Gov. Link)
Barnes	03/29/62	S	51,109	
Benson		G	63,363	
Benson	06/22/77	L		63,098
Benson	06/28/77	L		62,878**
Burke	03/29/62	S	33,161	
Burleigh	03/27/62	S	29,786	
Cass	03/29/62	S	8,000	
Cavalier	03/28/62	S	37,590	
Dickey	02/08/62	S	32,236	
Dickey	05/15/73	L/S		37,300
Divide	03/29/62	S	42,233	
Dunn	01/06/64	S	800	
Eddy	03/29/62	S	19,924	
Emmons	03/29/62	S	10,038	
Emmons	05/15/73	L/S		20,000
Foster	03/29/62	S	32,159	
G. Forks	03/29/62	S	7,240	
Griggs		G	19,369	
Kidder	12/18/61	G	56,282	
Kidder	05/15/73	L/S		66,300
LaMoure	12/18/61	G	28,615	
Logan	12/18/61	G	48,375	
McHenry	03/29/62	S	32,372	
McIntosh	12/18/61	G	47,767	
Bottineau	03/29/62	S	33,614	
McLean	03/29/62	S	52,260	
Mercer	01/06/64	S	2,000	
Mountrail	03/29/62	S	38,602	
Nelson	12/18/61	G	37,400	
Nelson	06/22/77	L		37,665
Nelson	06/28/77	L/S		37,885**
Pembina	11/26/62	S	6,000	
Pierce	03/29/62	S	38,215	

Ramsey	03/29/62	S	29,992	
Ransom	03/29/62	S	13,765	
Ransom	05/15/73	L/S		23,800
Renville	03/29/62	S	17,096	
Richland	06/18/62	S	15,561	
Rolette	06/18/62	S	23,455	
Sargent	06/18/62	S	26,152	
Sargent	05/15/73	L/S		32,000
Sheridan	06/18/61	S	41,178	
Steele	12/18/61	G	9,618	
Stutsman	02/05/62	S	96,150	
Towner	12/18/61	G	21,925	
Towner	03/07/69	S	27,000	
Traill	10/30/63	S	2,700	
Ward	06/18/62	S	39,407	
Walsh	11/26/62	S	500	
Walsh	03/08/63	S	6,000	
Walsh	03/07/69	S	9,000	
Wells	12/18/61	G	21,674	
Williams	06/18/62	S	27,591	
			1,237,274	280,163

*G = Governor Guy; L = Governor Link; S = Game and Fish Commissioner Stuart

**The later adjustment only was counted.

EXTRACT OF TESTIMONY
In Hearings before the
Subcommittee on Fisheries and Wildlife Conservation
H. R. 11525, July 11 and 12, 1962

MR. DINGELL. Governor there are some questions I would like to ask on another point. I believe your State has not permitted acquisition of land under the crash wetlands acquisition program authorized by the committee and the Congress during the previous Congress; am I correct?

GOVERNOR GUY. That is not entirely correct. We have a system whereby all applications for acquisition are submitted by the State game and fish department to my office by specific description. Those specified tracts are then referred to the county commissioners in the county in which the proposed tract is located. If the county commissioners, within 35 days, turn down the proposed acquisition, then approval is not given; if they do not reply in 35 days, or do approve within that time, then approval is given.

MR. DINGELL. How many acres have been approved in your State for acquisition under the crash program and how many have been denied?

GOVERNOR GUY. About 4,817 acres have been approved; and the number that has been disapproved, I do not have the figure . . . This acreage was largely in three counties; Bottineau, McHenry, and Stutsman, where Federal acquisition in the past has resulted in heavy holdings. * * *

MR. DINGELL. Let me ask you this: If the committee, in its wisdom, reports a bill to the floor, and if this bill becomes law, will we be able to state that your State has had its objections met to the Federal land acquisition within its borders for wildlife refuge purposes from the duck stamp funds?

GOVERNOR GUY. I would say if a bill would be reported out and if it were treated favorably and returned 1 percent, and also took into consideration bonded indebtedness, losses to counties from acquisition of Federal wildlife lands, that the major objections would be met.

I would say the bottleneck to acquisition under the crash program would have been removed. [pp. 20-21]

* * *

MR. DINGELL. I am concerned about this business of your acquiring lands by easement. You are only getting 20-year easements on these lands, are you not?

MR. JANZEN. We have said nothing less than 20 years. We are taking 30-year and 99-year easements. We are trying to take them for as long as we can.

MR. DINGELL. How are you going to have any continuity in the program if you have a 20-year leases?

MR. JANZEN. There are two reasons why we have to look to the easement problem to help us solve our overall problem.

MR. DINGELL. A shortage of money?

MR. JANZEN. Not that so much as, in many cases, landowners or farmers simply will not sell a piece of land out of their farm. They may have 10 potholes of 1, 2, or 3 acres each. They simply will not sell those potholes to the Federal Government.

MR. DINGELL. Why not?

MR. JANZEN. Because it would just make a hodgepodge of their ownership. They would have no control over who would be running over their properties. They might be in the middle of a wheat field, middle of a pasture, but by giving us the right, or, we might say, buying the right to not drain, burn, or fill, we assure the retention of these depressions, so that when there is

enough rainfall they will hold water and will product [sic] the ducks. This is the main reason why we are doing this.

MR. DINGELL. Can you not get a perpetual easement for this purpose?

MR. JANZEN. We have discussed the perpetual easement and it appears, in the eyes of the law, that we are on a sounder basis if we have a term rather than on a perpetual basis. [pp. 84-85]

* * *

MR. DINGELL. Just one more question: There are two provisions in law which require you to get State consent when you acquire refuge land; is that correct? One is the provision in the original Migratory Bird Act which requires you to have the consent of the legislature before you initiate land acquisition measures within the borders of the State.

MR. JANZEN. [Daniel H. Janzen, Director, Bureau of Sport Fisheries and Wildlife] That is right.

MR. DINGEL. *The other is the provision put in by the Senate in the recent wetland proposals which requires there be the assent of the Governor to each specific land acquisition; is that correct?*

MR. JANZEN. *That is correct.*

MR. DINGELL. The principal problem you have had in acquiring lands for refuge purposes has been in the three States of North Dakota, South Dakota, and Minnesota?

MR. JANZEN. That is right.

MR. DINGELL. Can you give us figures with regard to both acres and dollars, the amount of requests you have had to purchase land and the amount of permission you have received from the Governors of these three States to proceed with land acquisition?

MR. JANZEN. We have some figures on that and we can give you what we have here.

MR. McBROOM. [Bureau of Sport Fisheries and Wildlife] I can give you the number of cases where we have option but cannot proceed on now because the Governor's approval is lacking.

MR. DINGELL. Give it to us State by State.

MR. McBROOM. It only involves 2 States: North Dakota and South Dakota. For North Dakota the number of cases is 25, the number of acres is 5,148, the number of dollars is $198,333. For South Dakota, the number of cases is 8, the number of acres is 1,049, the number of dollars is $39,532. The total for the 2 States, is 33 cases, 6,179 acres, $237,865.

MR. DINGELL. These are where your requests for options are still pending?

MR. McBROOM. This is where agreement has been reached between us and the landowner, *but we cannot proceed because the Governor's approval is lacking.*

MR. DINGELL. But how about the instances where you have requested or where you have secured an option to purchase and have received the go-ahead in these States from the Governor's office?

MR. McBROOM. Perhaps we can supply that full set of figures for the record, if it please the committee. I can give you an indication on it from one of our offices in North Dakota which handles most of the acquisition in North Dakota. We have accepted options on 3,411 acres. We have exchange agreements which involve 1,007 acres. These involve 17 tracts. The total consideration is $99,782.

MR. DINGELL. You will submit the more complete figures for the record; is that correct?

MR. McBROOM. Yes, sir.

(The information follows:)

Wetlands acquisition status, Oct. 4, 1961, to June 30, 1962

State	Approved by Governor			Not approved by Governor		
	Number of cases	Acres	Cost	Number of cases	Acres	Cost
North Dakota	41	6,911	$220,275	25	5,148	$198,333
South Dakota	11	1,518	51,158	8	1,049	39,532
Minnesota	8	703	23,607	----	----	----
Total	60	9,132	295,040	33	6,197	237,805

[pp. 86-87; Emphasis added]

EXTRACT FROM CONGRESSIONAL RECORD
113 Cong. Rec. 16222 & 16224 (1967)

MR. HALL. Can the gentleman tell me why it was felt important by the committee that the provision relating to the veto by the Governors of the States in whose jurisdiction this land was being acquired should be removed? I recall the debate back in 1961. At that time the gentleman from Wisconsin [Mr. Reuss] and others felt that we should have the rights of the various States of the Union incorporated in the legislation.

MR. DINGELL. I am happy to respond to that. The language in the report on page 4, about four lines from the top, spells out clearly why the committee took that action. There are requirements in the law now which impose upon the Interior Department the responsibility of meeting fully the wishes of the States.

For example, when the Migratory Bird Conservation Commission sits to consider a refuge involving an area in a particular State, the representative of the Governor of that State is required under the constitution of the Migratory Bird Conservation Commission to sit also during consideration of the matter and to have his views considered fully.

MR. HALL. He could still be outvoted, could he not?

MR. DINGELL. Conceivably he could, but I would point out to my friend from Missouri that there is a further safeguard which I believe provides full protection, and that is it is already necessary for the Federal Government to have the approval of the legislature and the Governor of the State in which the refuge program is going to be conducted before it is possible for the Federal Government to go in and conduct any refuge operations in that State at all. It was the feeling of the committee that this requirement for the Governor's veto is no longer needed, particularly in the light of the enactment of the Congress during the past session, which earmarked three-quarters of 1 percent of the

assessed valuation of the refuge for payments to the States, in lieu of taxes, which is used for the purposes of constructing schools and roads.

• • •

MR. WAGGONNER. . . . I wish to pursue one step further the colloquy having to do with the removal of the veto authority of the several States. Is it not simply because the revenue-sharing legislation of 1964 made it mandatory that each State legislature pass an enabling act to participate in this revenue-sharing legislation?

MR. DINGELL. No; the enabling legislation was required back in the days when the first duck stamp legislation was passed. That was not in the 1964 amendments at all. For that reason this measure would merely restore the law to the form in which it was previous to the enactment of the original Wetlands Act program passed in 1961.

MR. WAGGONER. But it is felt that the veto authority is no longer needed in view of having reinstated this enabling act?

MR. DINGEL. The legislature's assent in several States was in effect at all times during this period.

The principal reason for the Governor's veto being inserted was the fact that the Governors in several States—and people in the counties particularly—felt these refuges might well wind up in a situation where lands were going off the tax rolls without any additional moneys coming in to meet the needs. We have passed legislation funding on a legitimate basis the legitimate needs of counties for schools and roads, so that the Governor's veto I do not believe is any longer necessary. And this was the opinion of the committee.

• • •

MR. CRAMER . . . I am concerned about repealing the power of the Governor of the individual States to act in this matter on a project-by-project basis and to determine whether it is in the best interest of the State, as well as the Federal Government to acquire these bird sanctuary areas as they arise individually.

I am very sorry to see this very constant effort to write out the State Governor in making these decisions. We wrote them into the law in 1961, and yet when you come in for an amendment or extension, you write them out.

This bill has come up for the consideration of the House under a suspension of the rules and one cannot offer amendments designed to write the Governor's power back into the legislation.

I want the Governor to have an opportunity to make these decisions, and I will say to the gentleman that I am aware that it requires further State legislative action in order to give that authority to the Federal Government, in effect, or to authorize it. But this amendment takes away the right of the State government, the right to judge these matters by project, when certain problems come up.

UNITED STATES DEPARTMENT OF THE INTERIOR
U.S. FISH AND WILDLIFE SERVICE
CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS

Contract No. 14-16 0006-6028

THIS INDENTURE, by and between Russell G. Nylen and Evelyn Nylen, his wife, of 1408 E. Thayer Avenue, Bismarck, North Dakota, parties of the first part, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative, party of the second part.

WITNESSETH:

WHEREAS, section 4 of the Migatory Bird Hunting Stamp Act of March 16, 1934, as amended by section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., sec. 718d(c)), authorizes the Secretary of the Interior to acquire small wetland or pothole areas suitable for use as waterfowl production areas:

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas:

NOW, THEREFORE, for and in consideration of the sum of Four thousand seven hundred fifty ($4,750.00) Dollars, the parties of the first part do hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made within months of the execution of this indenture by the parties of the first part, or any subsequent date as may be mutually agreed upon during the term of this option, a permanent easement (in perpetuity) or right of use for the maintenance of the land described below as a waterfowl production area, including the right of access thereto by authorized representatives of the United States.

The lands covered by this conveyance are those wetland areas, including lakes, ponds, marshes, sloughs, swales, swamps, potholes, and other wholly or partially water-covered areas, now existing or subject to recurrence through natural or man-made causes, delineated on the map(s) attached hereto as Exhibit A and incorporated herein by this reference; provided, always, that the lands covered by this conveyance shall include any enlargements of said wetland areas resulting from normal or abnormal increased water. Said lands are located within, and the aforementioned right of access extends over all lands within the following described legal subdivision(s) in McLean County, State of North Dakota, to wit:

T.149N., R. 78 W., 5th P.M.
Section 20: SW¼

Subject, however, to all existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, cable lines, and all mineral rights.

The parties of the first part, for themselves, their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining, causing or permitting the draining by construction of ditches, or by any means, direct or indirect, whether through the transfer of appurtenant water rights or otherwise, of any surface waters in or appurtenant to these wetland areas delineated on Exhibit A; by not filling in with earth or any other material or leveling any part or portion of said delineated wetland areas; and by not burning any marsh vegetation on any part or portion of said delineated wetland areas. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as

grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

Copies of the above-referenced map(s), being Exhibit A, are on file in the Office of the Regional Director, U.S. Fish and Wildlife Service.

SPECIAL PROVISIONS

1. This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the parties of the first part to be presently binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as hereinabove described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

2. Notice of acceptance of this agreement shall be given the parties of the first part by certified mail addressed to _____

_____

at _____

and such notice shall be binding upon all the parties of the first part without sending a separate notice to each.

3. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

4. Payment of the consideration will be made by a United States Treasury check after acceptance of this indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals this 15th day of August, 1977.

/s/ _____ (L.S.) _____ (L.S.)
Russell G. Nylen

/s/ _____ (L.S.) _____ (L.S.)
Evelyn Nylen

_____ (L.S.) _____ (L.S.)

_____ (L.S.) _____ (L.S.)

ACKNOWLEDGEMENT

STATE North Dakota

SS

COUNTY OF Burleigh

On this 15th day of August, in the year 1977, before me personally appeared Russell G. Nylen and Evelyn Nylen, his wife, known to me to be the persons described in and who executed the foregoing instrument and acknowledged to me that they (he) executed the same as this (their) free act and deed.

/s/ _____
Donald J. Fitzgerald

_____
(Notary Public)

(SEAL)

My commission expires Sept. 14, 1980

ACCEPTANCE

The Secretary of the Interior, acting by and through his authorized representative, has executed this agreement on behalf of the United States this day of 19 .

THE UNITED STATES
OF AMERICA

By_____

(Title)_____
U.S. Fish and Wildlife Service

STATE OF NORTH DAKOTA

Executive Office

Bismarck

Arthur A. Link
Governor

April 25, 1978

Mr. Russell W. Stuart, Commissioner
North Dakota Game and Fish Department
2121 Lovett Avenue
Bismarck, North Dakota 58505

Dear Mr. Stuart:

This is in response to your letter dated February 10, 1978, concerning the proposed acquisition by the Fish and Wildlife Service of the Hornbacher tract in Steele County.

Documents accompanying your letter indicate the tract is located in Section 1, Township 144 North, Range 55 West and Section 31, Township 145 North, Range 54 West, and comprises 448.61 acres. The tract is proposed as an addition to the National Wildlife Refuge System as authorized by P.L. 87-383, as amended.

Ownership of this tract by the United States would limit, in a sense, the state's sovereingty over the land. Federal statutes, rules, regulations, and orders would impose additional burdens on the land. An example is Executive Order 11990, issued on May 24, 1977.

This executive order is being cited by federal agencies to obstruct state efforts for reclamation projects (Garrison Diversion Unit and Apple Creek Unit), highway construction and maintenance, and water management activities.

The Channel "A" project in the Devils Lake Basin is a prime example. During the planning stage for the Channel "A" project, project sponsors requested permission from the Fish and Wildlife Service to cross easement land; the permission was never granted. As a result, construction plans for Channel "A" required modification, thereby increasing the cost of the project by at least $250,000. In addition, the revised route required the taking of two large wetlands that could have been avoided under the original plan.

The new highway location on Highway No. 2 east of Stanley offers another example. A two and one-half mile deviation from the section line was required to avoid wetlands. This caused a severance of 60 acres from one ranch unit and 118 acres from another, and a condemnation trial. The jury awarded $48,900 severance damages on the 60 acre severed unit. Consequently, the 118 acre severed unit was settled for approximately $50,000.

This proposed acquisition causes concern since the South Branch of the Goose River flows through the tract. As Gover-

nor and chairman of the State Water Commission, federal control over this strategically located tract is unacceptable. Although the environmental analysis states that "water management will be enhanced" (a statement not satisfactorily clarified by the Fish and Wildlife Service in their response to comments), this state's experience has clearly shown that local and state water management ability over a federally owned or controlled tract is diminished or eliminated.

However, the proposed acquisition of this tract will be approved subject to the following conditions:

1. Mr. Hornbacher must first execute a perpetual easement to the State of North Dakota allowing access to, and maintenance of, that reach of the South Branch of the Goose River which flows through the tract. Any conveyance from Mr. Hornbacher to the United States must be subject to the perpetual easement. Similar arrangements must also be made for highway construction or improvement if needed by the state or the county.

2. The Secretary of Interior must give the State full credit for 448.61 acres of "mitigation and enhancement" for the Garrison Diversion Unit.

3. Mr. Hornbacher must insert a provision in the deed that fee title shall automatically pass to the State of North Dakota, free from any encumbrances imposed by the federal government, if the Garrison Diversion Unit, as authorized in the 1965 Act or as reauthorized in a manner acceptable to the Legislative Assembly and Governor, is not essentially constructed by a certain date (such as the year 2000).

I recognize that the language of the conditions would have to be refined before any final agreement could be reached. Therefore, if the above-described conditions are generally acceptable to

the Secretary of Interior, I will designate an individual to negotiate the technical language.

It is requested that you inform Mr. Aultfather and Mr. Hornbacher of this decision.

Sincerely,

/s/ Arthur A. Link

Arthur A. Link
Governor

AAL:pw

STATE OF NORTH DAKOTA

Executive Office

Bismarck

April 16, 1979

Arthur A. Link
Governor

Mr. William Aultfather
Manager
U. S. Fish and Wildlife
Service
1500 Capitol Ave.
Bismarck, North Dakota 58501

Dear Mr. Aultfather:

This is in response to your press release which was carried in the *Fargo Forum* on March 28, 1979. The press release addressed several issues and each will be addressed below.

One part of the release stated:

> Aultfather said he was particularly concerned over apparent misunderstanding about the relationship between acquisition of mitigation for the Garrison project and the small wetlands program.
>
> "The two programs are separate and distinct," he said. The wildlife mitigation acres are to compensate for habitat destroyed by the Garrison project and are financed by congressional appropriation. The small wetlands acquisition program is funded by duck stamp sales and the program is strictly on a willing seller basis.
>
> Of Gov. Arthur Link's policy of vetoing land sales under the small wetlands program until the mitigation acres are met, Aultfather said, "It is unfortunate that our state leaders are now asking the small wetlands acquisition program and the sportsman who purchased duck stamps to pick up the tab for Garrison.
>
> "Shutting down the small wetlands acquisition program only penalizes the sportsmen and landowners. It resolves nothing for the Garrison project."

The press release is a misrepresentation of facts known to the FWS. We have emphasized to the Department of Interior on several occasions that duck stamp funds were not to be used for GDU project purposes. During a meeting in the Governor's office on August 31, 1978, this issue was discussed and the following were present: Ron Way, Assistant Secretary of Interior; William Aultfather, Area Manager; Lyle J. Schoonover, FWS; Allyn J. Sapa, FWS; Don Fitzgerald, FWS; George Gagnon, Governor's Office; Steven D. Little, Legislative Council; Gary Helgeson, Assistant Attorney General; Michael A. Dwyer, Special Assistant Attorney General (State Water Commission); and Murray G. Sagsveen, Assistant Attorney General. A verbatim transcript of the meeting was prepared and it indicates the following discussion:

MR. WAY: . . .I think, when Bob [Herbst, Assistant Secretary of Interior] was out here in May, the Governor did ask that we take a look at any possibility for utilizing lands acquired by the Fish & Wildlife Service in fee under the wetland program. Count that as mitigation for Garrison. And at that time Bob said that we would—we would take a close look at this issue and give it an honest try at—in attempting to come up with something that we could at least discuss.

I guess I must say that we have certainly done that. We haven't gone at this thing and come up with definitive answers as yet. We are still looking at it. We still want to come up with something that we can sit down and review with you folks. But I think it's fair to say that we have some fundamental problems in trying to—trying to satisfy that from the simple standpoint that the lands that you would be talking about here is for mitigation purposes on Garrison and would be acquired with duck-stamp funds.

MR. SAGSVEEN: It was my basic understanding that Bob—he thought that this mitigation and enhancement would be with duck-stamp funds. We indicated that it would not be, that it was the Governor's intent to transfer funds from the Bureau of Reclamation to the Fish and Wildlife Service so that the Fish and Wildlife Service would not be acquiring, with their funds, 146,000 acres. * * *

MR. WAY: You can understand our—our misunderstanding then, if there really is one. We may as well attempt to resolve it here. I guess, for purposes of accounting and even for purposes of legal clarity, the mitigation for Garrison is one issue. The use of any land acquired under the wetland program is quite a different thing. And when the two are brought together, as they were in the April 25th letter, that—that is where the confusion all comes from, because I hate to say you are talking about apples and oranges, but I guess you really are. * * *

MR. SAGSVEEN: I think what the Governor was basically saying was that the next 146,000 acres that are acquired in the State complete the commitment.

MR. WAY: I think that's what he was saying.

MR. SAGSVEEN: He didn't necessarily say those had to be paid out of the Fish & Wildlife duck-stamp funds.

MR. WAY: I am encouraged by that statement. That indicates that we don't have to be hung up on this business of using the wetlands acquisition for mitigation. . .

MR. SAGSVEEN: I think the Governor's proposal had two basic features; first, that the next 146,500 acres would satisfy the mitigation and enhancement by whomever acquired; that the funds would be paid under the Bureau of Reclamation funds for the project. I suppose you can take the money that was [liberated] and use that someplace else, the duck-stamp money.

MR. WAY: Okay.

(pp. 6-10)

The August, 1978, meeting followed a May, 1978, meeting between Assistant Secretary of Interior Herbst and me. A *Fargo Forum* (May 10, 1978) report of the meeting stated the following:

> According to Link, Herbst was "very concerned a precedent would be s[illegible] that they wouldn't be able to live with. One federal agency, in this case the fish and wildlife service, would be spending its money to mitigate for another project, in this case the Bureau of Reclamation's. He said that would violate their policy whereby "an agency that is responsible for a public project presently is required to fund all of the costs of that project."

> However, Herbst told Link Interior "would have no objection if they could get a commitment of funds to the fish and wildlife service from the bureau of Garrison mitigation. Then these acres could be credited but wouldn't be chargeable to the fish and wildlife service."
>
> Link told Herbst that would be fine, just as long as credit is given to Garrison.

It is apparent, therefore, that the policy which I established on April 25, 1978, has been misinterpreted. For this reason, I must restate my policy in order to leave no room for a misunderstanding. The policy will be very simple: I will not approve any further wetlands acquisitions by the Fish and Wildlife Service, pursuant to 16 U.S.C. § 715k-5, until all mitigation and enhancement lands are acquired for the Garrison Diversion Unit.

All proposed acquisitions will be returned unapproved. I will expect that lands offered for sale to the Fish and Wildlife Service will be available for acquisition by the Bureau of Reclamation for the Garrison Diversion Unit.

The second issue, of course, involves the so-called "land grab" problem. It is my opinion that there is an element of truth in the charges against the Fish and Wildlife Service in this matter.

The problem undoubtedly stems from the dispute which arose during the first year of my term concerning the Starkweather Watershed Project. You may be aware that SCS work on the project was suspended in November of 1973. During that month I wrote Secretary Morton expressing my dismay about the suspension and to request return of the mitigation land already acquired by the Fish and Wildlife Service:

> The local sponsors of this project believe that if this project is to be stopped, the easements and land purchased for mitigation by the bureau of Sport Fisheries and Wildlife should be released. The Ramsey County Commissioners approved the sale of these lands on the basis that this land

would be counted as mitigation for construction and completion of the Starkweather Watershed. They believe that if the Bureau now withdraws its previous approval, the easements and purchased land obtained with the understanding that the project would be approved should be returned to the local landowners.

My request was summarily denied.

That incident, unfortunately, was not an isolated event. West Bay of Devils Lake is an example involving the Garrison Diversion Unit.

As you know, the 1965 plan contemplated acquisition of 36 major areas along with a number of smaller areas to be developed for fish and wildlife purposes (see the November 14, 1962, report of the Fish and Wildlife Service and 1965 report of the Bureau of Reclamation which was specifically mentioned in the reauthorization law).

Relying upon the 1965 report and the accompanying 1962 FWS report, the GDCD and the Bureau of Reclamation entered a contract on January 26, 1966, which incorporated the large tract concept for mitigation and enhancement (Part II and Exhibit A of the contract).

The GDCD agreed in the contract to assume one-half of the separable recreation and fish and wildlife (R&FW) capital costs. payment could be made by the donation of lands or interest in lands (article 19). Subsequently Chapter 61-24 of the North Dakota Century Code was amended in 1967 to authorize the transfer of land from the State to the United States for the GDU.

The Master Contract was supplemented in 1971 to accommodate the transfer of tracts in the bed of the Devils Lake-Stump Lake chain to the United States (Contract No. 14-06-600-327A). The transfer of land was accomplished in a deed dated July 7, 1971. In August, 1972, the Regional Director

of the Bureau of Reclamation notified the chairman, GDCD, by letter that:

> The Garrison Diversion Conservancy District has conveyed their interest in 62,370 acres of land lying in Devils Lake chain of lakes to the United States. Based on the appraisal of Harry Arneson and using his unit value of types of lands involved, the Conservancy District has been credited $3,637,750. The lands involved are those which have been termed "lower and middle lakelands." Still to be conveyed are a part, or all, of those lands termed "upper lakelands," which comprise 20,676 acres to make a total of 83,046 acres on which the appraisal in the amount of $5,450,315 was based.
>
> * * *
>
> This is in accordance with the Master Contract with the Conservancy District, No. 14-06-600-8948, dated January 26, 1966, and an agreement dated February 25, 1971.

When the FWS subsequently adopted a "new concept" for the mitigation and enhancement plan, which emphasized "the restoration of natural wetland complexes interspersed within a block of upland cover", the bed of Devils Lake did not meet the criteria contained in the "new concept" and the FWS has declined to grant mitigation and enhancement credit for the land (Table 2, FSES Volume 2).

Table 1 of the 1962 FWS report indicates that about one-fifth of the 146,530 mitigation and enhancement acres consisted of water, marsh, and land from the West Bay of Devils Lake. The table indicates that the total West Bay acreage would be 33,960 of which 15,800 acres would be water and marsh (this acreage is identical to the acreage identified at page 14 of the 1965 Bureau of Reclamation report). The 1962 estimate of 15,800 acres is nearly identical to the 15,910 acres of West Bay land actually transferred to the United States in the 1971 deed. The 15,910 acres comprise pools 1 through 4 of the original FWS plan for restoration of Devils Lake.

It is apparent that the transfer of West Bay to the United States was contemplated in the 1962 FWS report and the 1965 Bureau of Reclamation report for mitigation and enhancement purposes. When the transfer was accomplished in 1971, other tracts were included to satisfy financial aspects of Part II of the Master Contract. It also appears that the transfer was made in good faith by all parties concerned.

Now, however, the FWS and the Bureau of Reclamation indicate that credit for mitigation and enhancement purposes cannot be given to the West Bay transfer because the lands involved do not meet the criteria contained in the "new concept" which has not yet been authorized. We must reject such a position for two basic reasons: refusal to credit land already acquired would result in acquisition of acreage above that authorized by law (which incorporates by reference the 1965 report) and would result in a breach of the 1966 Master Contract by the United States.

In addition, you stated that "There is nothing new in the mitigation requirements for the project". We both know this is incorrect. The FWS considers the authorized mitigation and enhancement plan superseded by the plan unilaterally developed by the FWS during 1974-1976. The "new" plan rejects the acquisition of existing wetlands and requires the acquisition of farmland so that wetlands may be restored.

I have reviewed your arguments that the new plan has superseded the authorized plan. I cannot agree with your position. The Board of Directors for the Conservancy District does not concur with your plan, the Master Contract has not been amended, Congress has not approved of the plan (an appropriations committee recommendation does not constitute congressional approval) and I have not consented to the new plan (see 33 U.S.C. § 701-1; § 1 of the Flood Control Act of 1944).

Finally, I have reviewed the recent letter to you from Attorney General Olson. I concur.

Sincerely,

/s/ Arthur A. Link
Governor

cc: Attorney General Allen I. Olson
Mr. William P. Bosse

c.m

COMPLAINT

Comes now the plaintiff, United States of America, by James R. Britton, United States Attorney, at the request of the Secretary of the Interior of the United States, and upon the direction of James W. Moorman, Assistant Attorney General, Land and Natural Resources Division, Department of Justice, and complains of the defendant and alleges as follows:

1. This is an action wherein the United States asks the court to declare that a permanent waterfowl easement acquired under the provisions of Section 4 of the Migratory Bird Hunting Stamp Act, 16 U.S.C. 718d(c), is a valid conveyance under federal law and vests in the United States the rights stated therein, notwithstanding the fact that the conveyance of such a property right is not permitted under North Dakota statutes. N. D. Cent. Code §20.1-02-18, §20.1-02-18.1, §20.1-02-18.2, and §47-05-02.1.

JURISDICTION

2. This is a civil acton instituted by the United States in its sovereign capacity seeking declaratory relief under 28 U.S.C. 2201, and the jurisdiction of this court is invoked under 28 U.S.C. 1345.

PARTIES

3. Plaintiff, United States of America, through the Secretary of the Interior, is responsible for the acquisition of areas of land and water in fee and easement for use as migratory waterfowl habitat under the provisions of the Migratory Bird Conservation Act (MBCA), as amended 16 U.S.C. §§ 715-715d, 715e, 715f-715k, 715l-715r; and the Migratory Bird Hunting Stamp Act (Duck Stamp Act), as amended, 16 U.S.C. 718 *et seq.*

4. The defendant is the State of North Dakota, a sovereign state of the United States, within the boundaries of which are situated a predominant portion of the Nation's migratory waterfowl habitat sought to be preserved under the provisions of the MBCA and Duck Stamp Act.

STATUTORY FRAMEWORK

5. The Secretary of the Interior is authorized under Section 5 of the MBCA, as amended by the Act of November 8, 1978, 16 U.S.C. 715d, to acquire areas of land or water or interests therein, for use as inviolate sanctuaries for migratory birds. Section 7 of the MBCA provides that no deed or instrument of conveyance authorized under Section 5 of the MBCA shall be accepted by the Secretary of the Interior unless the State in which the area is situated has consented by law to the acquisition by the United States of lands in that State. 16 U.S.C. 715f. On March 2, 1931, the State of North Dakota enacted legislation giving its unconditional consent. N.D. Cent. Code §20.1-02-18.

6. The Secretary of the Interior is authorized under Section 4 of the Duck Stamp Act, 16 U.S.C. 718d(c), to acquire small wetland and pothole areas or interests therein, designated as "Waterfowl Production Areas", without regard to the limitations of the MBCA, including the limitation in Section 5 [sic] of the MCBA requiring the consent by law of the States.

7. The Wetlands Loan Act provides that no lands shall be acquired with funds appropriated as an advance for the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency. 16 U.S.C. 715k-5.

8. The Governor of the State of North Dakota has given unconditional approval to the Secretary of the Interior for the acquisition of waterfowl easements under Section 4 of the Duck Stamp Act of an acreage sufficient to fulfill the goals of the Fish and Wildlife Service in North Dakota.

9. The Secretary of the Interior, acting through the Fish and Wildlife Service, has acquired under Section 4 of the Duck Stamp Act principally permanent waterfowl easements as Waterfowl Production Areas with MBCA funds appropriated under the Wetlands Loan Act.

WATERFOWL PRODUCTION AREAS PROGRAM

10. The Waterfowl Production Area acquisition program is the Fish and Wildlife Service's priority land acquisition program. The principal portion of the Nation's migratory waterfowl habitat to be preserved is located in the northern prairie pothole region of the United States, predominantly in the State of North Dakota.

11. The United States presently owns about 1.1 million wetlands acres of permanent waterfowl easements as Waterfowl Production Areas, of which 764,522 wetland acres are located in North Dakota. The present acreages include 18,000 acquisitions, of which 11,685 acquisitions are in North Dakota. Acquisitions costs presently total $27 million nationwide, and $17.6 million has been expended in North Dakota.

12. The national goal for acquisition of permanent Waterfowl Production Area easements is 1.6 million wetland acres, of which 989,135 wetland acres are to be located in North Dakota.

The Fish and Wildlife Service anticipates further purchases to be about 500,000 wetland acres, of which 225,000 wetland acres are to be acquired in North Dakota.

RECENT NORTH DAKOTA LEGISLATION

13. On July 1, 1977, North Dakota Senate Bill No. 2016, enacted to amend and reenact Section 20.1-02-18 of the North Dakota Century Code relating to the State's consent to the United States acquisition of areas for migratory bird reservations, became effective. Section 3 of the bill provided that:

> 20.1-02-18.2. NEGOTIATION OF LEASES, EASEMENTS, AND SERVITUDES FOR WILDLIFE PRODUCTION PURPOSES. A landowner may negotiate the terms of a lease, easement, or servitude for land, wetland, or water areas sought to be acquired by the United States Department of the Interior, its bureaus or agencies with moneys from the migratory bird conservation fund (16 U.S.C. 718d) for use as waterfowl production areas, wildlife refuges, or for other wildlife purposes. A landowner may:
>
> 1. Negotiate the time period of the lease, easement, or servitude being sought. A lease, easement, or servitude shall terminate upon the death of a landowner or upon change of ownership.
>
> 2. Restrict a lease, easement, or servitude by legal description to the land, wetland, or water areas being sought, and may drain any after-expanded wetland or water area in excess of the legal description in the lease, easement, or servitude.
>
> Failure by the Department of the Interior, its bureaus or agencies, to agree to and comply with the above provisions shall nullify North Dakota's consent to the federal acts under section 20.1-02.18 [sic].

14. On July 1, 1977, North Dakota House Bill No. 1087, to regulate real property easements, servitudes, or any nonappurtenant restriction on the use of real property, became effective. N.D. Cent. Code §47-05-02.1. Section 1 provides, in pertinent part, that:

> Section 1. REGULATIONS GOVERNING EASEMENTS, SERVITUDES, OR NONAPPURTENANT RESTRICTIONS ON THE USE OF REAL PROPERTY. Real property easements, servitudes, or any nonappurtenant restrictions on the use of real property, which become binding after the effective date of this Act, shall be subject to the regulations contained in this act. These regulations shall be deemed a part of any agreement for such interests in real property whether or not printed in a document of agreement.
>
> * * * * *
>
> 2. The duration of the easement, or nonappurtenant restriction on the use of real property shall be specifically set out, and in no case shall the duration of any interest in real property regulated by this act exceed ninety-nine years.

EFFECT OF RECENT NORTH DAKOTA STATUTES UPON WATERFOWL PRODUCTION AREA ACQUISITION PROGRAM

15. Shortly after the enactment of the North Dakota statutes referred to in paragraphs 13 and 14 of the complaint, the United States negotiated a contract for the purchase of a permanent waterfowl easement for a Waterfowl Production Area over an 160-acre tract in section 20, T. 149 N., R. 78 W., 5th P.M., McLean County. Due to the uncertainty in the ability of the prospective vendor to convey a permanent easement created by the enactment of said statutes, the Secretary of the Interior requested the Attorney General, pursuant to his authority under 40 U.S.C. 255, to render an opinion as to the validity of the ti-

tle. The Attorney General advised that prior to the consummation of acquisition, it must be first determined that the legal operation and effect of the statutes referred to in paragraphs 13 and 14 of the complaint do not restrict the right and capacity of the vendors to convey a permanent easement to the United States. Until the Attorney General gives written approval of the sufficiency of title to the interest in land for the purpose for which it is to be acquired, the United States, acting through the Fish and Wildlife Service, is unable to acquire permanent waterfowl easements in the State of North Dakota. While such an opinion could be issued, as set forth in this complaint it appears that it will be contested by the State of North Dakota. As the question is not totally free of doubt, expenditures of the taxpayers money based upon such an opinion should not be made without the declaration of this court as to the law that applies to this dispute.

16. Because of the uncertainty created by the statutes referred to in paragraphs 13 and 14 of the complaint, and because of the circumstances described in paragraph 15 of the complaint the Fish and Wildlife Service is unable to negotiate with approximately 50 landowners who approached it about the prospect of selling permanent waterfowl easements to the United States as Waterfowl Production Areas, and said stalemate will continue until a determination is made by this court upon the legal operation and effect of said statutes upon the ability of the United States to acquire permanent waterfowl easements.

17. After the enactment of the statutes referred to in paragraphs 13 and 14 of the complaint, the Fish and Wildlife Service reduced the realty personnel in its land acquisition staff in North Dakota from 19 to 8 because of the doubt over its ability to acquire any permanent easements within the State of North Dakota. The eight remaining realty personnel work exclusively on fee acquisitions.

18. Because of the doubt over the ability of the United States to acquire permanent waterfowl easements in North Dakota,

the Fish and Wildlife Service's waterfowl Production Area program is in serious and immediate jeopardy due to the drainage of wetlands in North Dakota, which recently has increased at an alarming rate.

19. Pursuant to the Drainage Referral Act, 16 U.S.C. §590p-1, the Secretary of Agriculture may not provide financial or technical assistance for wetland drainage on farms in the State of North Dakota, South Dakota, and Minnesota, if the Secretary of the Interior makes a finding that wildlife preservation will be materially harmed. The limitation on the Secretary of Agriculture furnishing such financial or technical assistance terminates one year after the date of the Secretary of the Interior's adverse finding, unless during that time an offer has been made by the Secretary of the Interior or a state agency to lease or purchase the wetland areas as a waterfowl resource. Prior to the enactment of the North Dakota statutes referred to in paragraph 13 and 14 of the complaint, the Fish and Wildlife Service was able to prevent drainage of many wetlands by acquiring permanent easements on the areas, thereby utilizing the limitation of the adverse finding under the Drainage Referral Act. Since enactment of said statutes, the Secretary of the Interior's adverse findings have been able to stay the drainage of wetland areas for only one year.

20. As mitigation for the damage to Waterfowl Production Areas caused by projects constructed by public utilities, municipalities, and other governmental entities for public benefit, the United States may agree to an equal exchange of wetlands for wetlands to be acquired elsewhere. For the past two years, the United States has been unable to agree to any easement exchanges in North Dakota because of the doubt over its ability to acquire new wetland areas easements of equal duration to exchange.

21. The enactment of the statutes referred to in paragraphs 13 and 14 of the complaint has had direct and immediate impact upon the ability of the United States to acquire permanent

waterfowl easements, and, as a result, the Waterfowl Production Area program as contemplated by the Congress and as provided in the Duck Stamp Act has suffered a serious and immediate injury by the draining of wetlands over which permanent waterfowl easements would otherwise have been acquired.

22. The statutes referred to in paragraphs 13 and 14 of the complaint are in conflict with and are aberrant and hostile to the purpose and policies of the MBCA and the Duck Stamp Act enacted by Congress in pursuance of its powers under the Constitution, and said statutes, under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, are without any force or effect upon and have no application to the ability of the United States to acquire permanent waterfowl easements under the provisions of the Duck Stamp Act.

WHEREFORE, plaintiff, United States of America prays for a judgment against the defendant declaring:

1. That said North Dakota laws, which purport to preclude the conveyance of permanent easements to the United States, are aberrant and hostile to the purposes and policies of the Migratory Bird Conservation Act and the Migratory Bird Hunting Stamp Act insofar as permanent easements for Waterfowl Production Areas may be acquired under provisions of federal laws.

2. That the acquisition of a permanent waterfowl easement under section 4 of the Migratory Bird Hunting Stamp Act, 16 U.S.C. 718d(c), is a valid conveyance under federal law and vests in the United States the rights stated therein, notwithstanding that a conveyance of such a property right is not permitted under North Dakota law. N.D. Cent. Code §20.1-02-18, §20.1-02-18.1, §20.1-02-18.2, and §47-05-02-18.

3. That the acquisition of a fee, easement, lease, or any other interest under section 4 of the Migratory Bird Hunting Stamp Act, 16 U.S.C. 718d(c), does not require the consent by law of

the State of North Dakota, and that the provisions of Section 7 of the Migratory Bird Conservation Act, 16 U.S.C. 715f, and the provisions of N.D. Cent. Code §20.1-02-18, §20.1-02-18.1, and §20.1-02-18.2 enacted pursuant thereto, are without any force or effect upon and have no application to such acquisitions.

4. That plaintiff be granted all further and general relief as the Court may deem just and proper in the premises;

5. That plaintiff be awarded its costs expended herein.

Dated this 29th day of May, 1979.

JAMES W. MOORMAN
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D. C. 20530

JAMES R. BRITTON
United States Attorney

Post Office Box 2505
Fargo, North Dakota 58108

John E. Lindskold
Attorney, Department of Justice

AFFIDAVIT OF ARTHUR A. LINK

Before me personally appeared Arthur A. Link, 1131 North Fourth Street, Bismarck, North Dakota, who being duly sworn, deposed and said:

1. I am the Governor of the State of North Dakota with executive offices at the State Capitol, Bismarck, North Dakota. I have been Governor of the State of North Dakota since January, 1973. I served as congressman for the West District of North Dakota in the United States House of Representatives from January, 1971, to January, 1973. I served as an elected representative to the North Dakota House of Representatives from 1946 through 1970. As Governor, I am Chief Executive Officer of the State and am responsible for the supervision of the official conduct of all executive officers of the State.

2. Pursuant to 16 U.S.C. §715k5, no land may be acquired in the State of North Dakota with moneys from the Migratory Bird Conservation Fund unless the acquisition "has been approved by the Governor of the State or the appropriate State agency." The authority to approve such acquisitions has not been delegated to any State agency.

3. During my six and one-half years as Governor of the State of North Dakota, I have approved the acquisition of over 40,000 acres of wetlands and adjoining uplands by the Secretary of Interior with moneys from the Migratory Bird Conservation Fund.

4. Acquisition of federal land in North Dakota, as with other states, is a controversial issue. The federal government owns or controls millions of acres in North Dakota.

5. The Department of the Interior, through the Fish and Wildlife Service (FWS) controls or owns the following land (data from November, 1977): National Wildlife Refuges - 190,528.76 fee acres; Waterfowl Production Areas - 211, 904.03 acres (optioned or acquired); wetland easements

-771,991 acres (this does not include several million acres of non-wetland areas within the legal description of the easement).

6. Legislative concern regarding FWS acquisitions led to the passage of Senate Concurrent Resolution 4048 in 1975. The resolution called for an interim study about the effects of the programs and policies of the FWS along with a review of the compatibility of those programs and policies with agricultural production in North Dakota. SCR4048 is attached as Exhibit 1.

7. The interim committee recommended legislation which was similar to the law being challenged by plaintiff. See extracts from "Report of the Committee on Agriculture Submitted to the North Dakota Legislative Council" dated November, 1976, attached as Exhibit 2.

8. The Legislative Assembly considered the proposed legislation and approved a modified version of the bill. I signed Senate Bill 2016 (Ch. 204, 1977 S.L.), the subject of this litigation, on April 21, 1977. The bill is attached as Exhibit 3.

9. The legislation evoked an immediate response from the FWS. Lynn Greenwalt, Director of the FWS addressed the issue at an annual convention of the National Wildlife Federation on January 15, 1977. Greenwalt said "he would anticipate some type of legal action" if the legislation were passed. Further, Greenwalt said "he would recommend to the Secretary of Interior that appropriate action be taken by the federal government to overcome the legislation." *The Sunday Forum,* January 16, 1977, at A-6.

10. The litigation options were discussed between the FWS and at least one environmental organization, the Izaak Walton League of America. The Izaak Walton League committed $1,000, upon estimates by the FWS concerning legal fees, to a "would-be seller's legal expenses." See memoranda from Dave Zentner to the executive board attached as Exhibit 4.

11. I wrote to Secretary Andrus on January 6, 1978, concerning the Izaak Walton League memoranda:

> The August 29 and September 8, 1977, memos from David Zentner to the executive board of the league reveal a cooperative effort on the part of the Department of Interior and the Izaak Walton League to challenge the laws of the State of North Dakota. I find the relationship of the Izaak Walton League and the Solicitor's office on this matter to be repugnant. Further, I consider the apparent collusion between federal agency representatives and special interest group representatives a hindrance to healthy state-federal relations in the management of our natural resources. Therfore, I would appreciate a complete explanation concerning Interior's apparent efforts to challenge the law. . .

An Acting Secretary (Undersecretary James A. Joseph) responded on March 21, 1978, by stating:

> In my view, the Izaak Walton League's interest in testing the new law is to clarify its intent and to minimize any adverse affects it may have on preserving the nation's wetlands. We share that interest, but not necessarily in a collusive manner.
>
> * * *
>
> In an effort to clarify some of the ambiguous points of this legislation, the Service has requested a review by the Department of Justice to resolve the types of questions alluded to by the North Dakota Attorney General's office. The Izaak Walton League's interest in the protection of wetlands is longstanding and well known. They have offered, should it become necessary, to assist in the payment of legal fees incurred by a North Dakota landowner. This is necessary to protect the citizen from personal cost which cannot be reimbursed by the Service, and probably not by

any other public entity. The Service is anxious to proceed with whatever legal process is necessary to remove the ambiguities of SB2016 as they pertain to easement acquisition, and I ask for your support in this effort.

12. Attorney General Olson and others met with Department of the Interior attorneys on April 24, 1978, to discuss Senate Bill 2016. A verbatim transcript of the meeting was given to me. The Attorney General recommended that the Department of the Interior seek modifications in SB2016 before considering litigation. Further, the Attorney General declined to participate in a friendly test case.

13. I met with Assistant Secretary of the Interior Herbst on May 9, 1978, concerning the threatened lawsuit and the suggestion to seek legislative amendments. The meeting was reported the following day:

> According to Link, Herbst told him "we could pursue it in the courts but we'd prefer to resolve it in some other manner."
>
> Herbst told Link the federal government's objection to the law focuses entirely on the clause which provides the easements may be terminated automatically. According to Link, Herbst said "there was no way they can acquire easements with those conditions attached. He was hoping there was some way to moderate the law."
>
> However, Herbst said the federal government has "no objection to the negotiation features of the law which provide the seller (of the easement) could negotiate the terms of the sale."
>
> I told him we'd certainly give consideration to an amendment," Link said. "I didn't make a promise or a commitment. But I was certainly interested in hearing them say they're willing to compromise."
>
> The Forum,
> May 10, 1978, at 13.

14. State and federal officials met again concerning this matter on August 31, 1978. A verbatim transcript of the meeting was given to me.

15. Legislation was introduced on January 3, 1979 (SB2141 introduced by Sen. Fritzell) to eliminate the conditions imposed by SB2016. It was defeated in the Senate 14 to 35. The bill is attached as Exhibit 8.

16. Immediately after the Legislative Assembly adjourned, Assistant Secretary Herbst wrote (April 27, 1979) to advise a lawsuit would be filed. The situation was summarized in a news article the following day:

> The Interior Department changed its mind on challenging North Dakota's wetlands acquisition law because neither the Legislature nor the courts changed it, a spokesman for Interior Secretary Cecil Andrus said. . .
>
> The spokeman in Washington said Interior broke off its pursuit of legal action last fall because it expected a private court challenge to the statute, which allows a county commission to block sale of wetlands to the U.S. Fish and Wildlife Service. A similar law governs acquisitions by the State Game and Fish Department.
>
> But neither the suit nor satisfactory action by the Legislature materialized, and now Interior expects to file in district court in North Dakota in a few weeks. * * *
>
> Another reason Interior chose not to sue last fall was the Justice Department could not design a case acceptable to Interior officials. The spokesman for Andrus said. . .new lawyers have since begun work at Justice. "I think the Justice Department thinking on this subject has evolved, too," he added.

17. Although I have approved the acquisition of numerous tracts by the FWS, I have become increasingly concerned about

the ramifications of extensive federal land ownership in North Dakota. One of my first public expressions of concern was contained in remarks to the Annual Joint Convention of the North Dakota Water Users and Water Management Districts Associations on December 6, 1977. The remarks concerned the events of the previous year in which federal executive branch opposition to the Garrison Diversion Unit resulted in complex litigation and suspension of project construction. I said:

> How should we react? Should we give up and forget about a project that has been a dream of North Dakota citizens for nearly a century? I think not. Therefore, I believe it is time we reassess our relationship with the federal government. * * *
>
> [One] area of consideration is the federal acquisition of land in North Dakota. By November of this year, the Department of Interior had acquired nearly 200,000 acres in fee (190,528.76) for National Wildlife Refuges. They had acquired another over 200,000 acres (211,904.03 acres either optioned or acquired as of November 11, 1977) for waterfowl production areas. In addition they have acquired over three-quarters of a million acres (771,991 acres) in wetland easements.
>
> When the Garrison Diversion Unit was reauthorized in 1965, the Department of Interior was authorized to acquire 146,530 acres for mitigation enhancement purposes. Now, however, the Department of Interior states that 146,530 acres is not enough and they want more.
>
> How much is enough? North Dakota has already turned over more than a million acres to federal ownership or control of wetlands.
>
> Perhaps we should refuse to consider, as authorized under federal law, to approve further acquisitions by the Department of Interior in North Dakota until such time as the Garrison Diversion Unit has been constructed and is in operation.

18. In my letter of January 6, 1978 (¶11, above), I reproduced the above-quoted extract from my speech and stated:

> It is my intention to refer these matters to the Legislative Assembly during the forthcoming session in 1979. So that the Legislative Assembly may be better prepared to address the entire issue of Interior's acquisitions in North Dakota, I am hereby requesting that you cause a programmatic environmental impact statement to be prepared, in compliance with guidelines established by the Council on Environmental Quality and with specific emphasis on the impact such acquisitions have on the state's ability to manage its water resources, for the entire wetlands acquisition program of the Department of Interior in North Dakota. The statement should be available by December 1, 1978.

19. The March 21, 1978, response from Undersecretary Joseph merely referred me to a November, 1976, statement on the "Operation of the National Wildlife Refuge System."

20. On April 25, 1978, I established a policy to approve further FWS if certain conditions were met. Two basic conditions were:

a. The Secretary of Interior must give the State full credit for the acquired acreage as "mitigation and enhancement for the Garrison Diversion Unit."

b. The deed must contain a provision "that fee shall automatically pass to the State of North Dakota, free from any encumbrances imposed by the federal government, if the Garrison Diversion Unit, as authorized in the 1965 Act or as reauthorized in a manner acceptable to the Legislative Assembly and Governor, is not essentially constructed by a certain date (such as the year 2000)."

The entire letter is attached as Exhibit 5.

21. The April 25 letter also cited two other reasons for reviewing the acquisition policy: federal acquisitions have increased the cost, at the same time they delayed state water management and highway projects.

22. Assistant Secretary Herbst responded to the two conditions (¶20, above) in a September 22, 1978, letter to me. It stated, in part:

> Your letter of April 25, 1978, to Mr. Russell Stewart, Commissioner of the North Dakota Game and Fish Department, laid out three added conditions not included in the legislation under which you would approve fee acquisition proposals. The last two of these additional conditions—relating to crediting acquisition to mitigation for the Garrison Project, and to title passage of acquisition to the State if Garrison is not completed by a given date—are unacceptable in that they impose unreasonable constraints which simply cannot be accommodated.

The letter also stated that "The Fish and Wildlife Service will not approve any more wetland easement acquisition in North Dakota."

23. During the past year, I have witnessed a "misunderstanding" of my April 25, 1978, policy statement. The details of the misunderstanding are contained in an April 16, 1979, letter to the FWS Area Manager; the letter is attached as Exhibit 6. In response, I restated my earlier policy:

> It is apparent. . .that the policy which I established on April 25, 1978, has been misinterpreted. For this reason, I must restate my policy in order to leave no room for a misunderstanding. The policy will be very simple: I will not approve any further wetlands acquisitions by the Fish and Wildlife Service, pursuant to 16 U.S.C. §715k-5, until all mitigation and enhancement lands are acquired for the Garrison Diversion Unit.

24. My termination of FWS acquisitions follows a precedent established by Governor Guy. It is my understanding that he suspended FWS acquisition because of FWS activities related to the Starkweather Watershed project. The Starkweather dispute is summarized in an extract from an April 5, 1979, memorandum from Assistant Attorney General Murray G. Sagsveen to Attorney General Olson, attached as Exhibit 7.

25. The policy expressed in ¶23, above, is firm and I anticipate no modifications to this policy.

/s/ Arthur A. Link, Governor
State of North Dakota

PLAINTIFF'S ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES AND RESPONSE TO DEFENDANT'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Now comes the Plaintiff, United States of America, by Lynn A. Greenwalt, Director, Fish and Wildlife Service, Department of the Interior, and answers certain interrogatories and requests for documents heretofore propounded by the Defendant and not objected to by the Plaintiff as follows:

INTERROGATORY NO. 1: The complaint paragraph 8, states:

> The Governor of the State of North Dakota has given unconditional approval to the Secretary of the Interior for the acquisition of waterfowl easements under Section 4 of the Duck Stamp Act of an acreage sufficient to fulfill the goals of the Fish and Wildlife Service in North Dakota.

When, and in what manner, was such "unconditional approval" given by the Governor? If such "unconditional approval" was given in a document, attach a copy of the document.

ANSWER: State approval to acquire wetland easements in 41 counties in North Dakota was granted originally in 1961 to 1964 by Governor William Guy or Game and Fish Commissioner Russell Stuart as an authorized representative of the Governor. The documents cite a maximum wetland acreage for easement acquisition in each county. As the program progressed, it became evident that some acreage adjustments would be necessary in certain counties. These requests were submitted to the Governor through the Game and Fish Commissioner and subsequently approved. Governor Authur Link approved such adjustments during the period 1973 to 1977. The most recent adjustments involved Nelson and Benson Counties and were ap-

proved by Governor Link in June 1977. Attached are Governor approval letters for individual counties.

INTERROGATORY NO. 2: The complaint, at paragraph 11, states: The United States presently owns about 1.1 million wetlands acres of permanent waterfowl easements as Waterfowl Production Areas, of which 764,522 wetlands acres are located in North Dakota. The present acreage include 18,000 acquisitions, of which 11,685 acquisitions are in North Dakota . . . .

a. What is the total acreage (wetland and upland) of permanent easements as Waterfowl Production Areas which is owned by the United States?

b. What is the total acreage (wetland and upland) in North Dakota of permanent easements as Waterfowl Production Areas which is owned by the United States?

c. What is the total fee acreage (wetland and upland) of Waterfowl Production Areas which is owned by the United States?

d. What is the total fee acreage (wetland and upland) in North Dakota of waterfowl Production Areas which is owned by the United States?

e. What is the total acreage (wetland and upland) in North Dakota of fee or easement land which is owned by the United States for fish and wildlife purposes?

ANSWER: Except where otherwise stated, all following statistical data have been taken from the "Annual Report of Lands under Control of the U.S. Fish and Wildlife Service" dated September 30, 1978.

a. The Fish and Wildlife Service, USDI, has acquired perpetual easements for Waterfowl Production Areas under Section 4 of the Duck Stamp Act, 16 U.S.C. 718d(c) in four States. The total acreage described in the easements

is 7,095,538 acres; however, the easement restrictions on draining, burning, filling, and leveling apply only to 1,111,802 wetland acres.

b. The total acreage described in the permanent easements for Waterfowl Production Areas acquired in North Dakota by the Fish and Wildlife Service, USDI, is 4,788,300 acres; however, the easement restrictions on draining, burning, filling, and leveling only apply to 764,522 wetland acres.

c. The total fee acreage acquired by the Fish and Wildlife Service, USDI, as Waterfowl Production Areas for seven States is 446,207 acres. This acreage does not include 9,976 acres of public domain that is managed in conjunction with the acquired land.

d. The total fee acreage acquired by the Fish and Wildlife Service, USDI, as Waterfowl Production Areas in North Dakota as of September 30, 1978, was 213,776 acres. This acreage does not include 8,168 acres of public domain which is managed in conjunction with the acquired lands. The total acquired fee acreage of Waterfowl Production Areas in North Dakota as of January 1, 1979, is 216,543 acres. This latter figure represents an update to reflect additional acquisitions during the period September 30, 1978, to January 1, 1979.

e. The total acreage of all fee and easement lands under jurisdiction of fish and Wildlife Service, USDI, in North Dakota as of January 1, 1979, is as follows. (These data do not include lands administered by other Federal agencies such as the Forest Service, Army Corps of Engineers, Bureau of Reclamation, Park Service, Bureau of Land Management, etc.).

Fee

	Acres	
Waterfowl Production Areas	216,543	
National Wildlife Refuges	202,027*	
Northern Prairie Wildlife Research Center	588	
National Fish Hatcheries	71	
Subtotal		419,229*

*includes meandered acres

Easement (Upland and Wetlands)

	Acres	
Waterfowl Management Rights	4,788,300	
Easement Refuges	67,551	
Subtotal		4,855,851

Other

	Acres	
Public Domain—Waterfowl Production Areas	8,168	
Public Domain—National Wildlife Refuges	4,504	
Secondary Jurisdiction—Audubon NWR	14,776	
Secondary Jurisdiction—National Fish Hatcheries	223	
Subtotal		27,671
GRAND TOTAL		5,302,751

INTERROGATORY NO. 3.: The complaint, at paragraph 12, states: The national goal for acquisition of permanent Waterfowl Production Area easements is 1.6 milion wetland acres, of which 989,135 wetland acres are to be located in North Dakota. The Fish and Wildlife Service anticipates further purchases to be about 500,000 wetland acres, of which 225,000 wetlands acres are to be acquired in North Dakota.

a. Who determined the goals for acquisition of permanent Waterfowl Production Area easements or fee land in the United States and North Dakota? When was the determination made? Attach the decision document containing the determination.

b. Which North Dakota state officials or citizens participated in the decision-making process to determine the goals for acquisition of permanent Waterfowl Production Areas easements or fee land in the United States and North Dakota? When did the participation occur? Attach any documents concerning such participation.

c. Have environmental assessments, negative declarations, environmental impact statements or program description option documents been prepared concerning the goals for acquisition of permanent Waterfowl Production Area easements or fee land in the United States and North Dakota? If so, attach the documents.

d. Have environmental assessments, negative declarations, environmental impact statements or program description option documents been prepared concerning the acquisition goals of fee and easement land in North Dakota for fish and wildlife purposes?

ANSWER:

a. Congress authorized the purchase of small wetlands and pothole areas or interests therein when the Duck Stamp Act was amended in 1958 (P.L. 85-585). The Wetlands Loan Act (P.L. 87-383) was subsequently passed by Congress in 1961 to "prevent the serious loss of important wetlands and other waterfowl habitat." This Act provided additional funds to accelerate the acquisition of waterfowl breeding habitat in the prairie pothole States. Acquisition goals for this accelerated program were

recommended by the Director, FWS, to the Congress during the legislative hearings for P.L. 87-383. *See* Hearing on H.R.7391 before a Subcommitee of the Committee on Appropriations, House of Representatives, 88th Cong., 1st Sess. (1964) at 422-430. The Wetlands Loan Act was extended in 1967 and again in 1976. The latter extension revised the previous goals established in 1961. Senate Report No. 91-594, 94th Cong. 2d Sess (1976) and H. Rep. No. 95-1518, 95th Cong. 2d Sess. (1978) refer to the revised acquisition goals. In summary, current goals for acquisition of waterfowl breeding habitat for the prairie pothole States were calculated as follows:

	Fee (Acres)	Easement (Wetland Acres)
1961-1976	600,000	1,150,000
1977-1986	275,000	550,000
	875,000	1,700,000

Based on these data, the Regional Director, Fish and Wildlife Service, Denver, allocated acreage goals among the prairie pothole States, including North Dakota, based principally on importance to breeding waterfowl, degree of threat to the habitat, and habitat availability. This determination was made by the Regional Director on February 26, 1976 (copy attached).

b. Former Governor William Guy, Game and Fish Commissioner Russell Stuart, and Governor Arthur Link participated in the process of setting goals through the approval of County easement acres referred to in Interrogatory No. 1. This was done during the period 1961 to 1977.

United States Senators Burdick and Young and Congressman Andrews participated in the approval of national acquisition goals by voting in favor of the Wetlands Loan Act, together with the amendments in 1967 and 1976. *See,* 121 Cong. Rec. 21596-99 (1975), wherein the House voted on the 1976 Extension of the Wetlands Loan Act, including an affirmative vote by Congressman Andrews.

An Environmental Statement for Operation of the National Wildlife Refuge System was finalized in 1976. Land acquisition is addressed in the Environmental Statement. Seven public hearings were held between March 2 and March 17, 1976, to receive comments on the draft statement. Public participation was invited at the hearings. All comments received at the public hearings were reviewed and combined with written correspondence. Transcripts of the hearings are on file at the Office of the Chief, Division of National Wildlife Refuges, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240. Written comments from North Dakota citizens that were printed along with the Environmental Statement are attached.

c. The portion of the Environmental Statement that pertains to Fish and Wildlife Service's land acquisition programs is attached. A complete Environmental Statement can be obtained from the address mentioned in Interrogatory No. 3 (b), above. All acquisition programs, including the Wetlands Acquisition Program, are discussed in the Statement. The mission, goals, and priorities are indicated, in both the statement and the appendixes. The impacts of the acquisition program (as part of the operation of the NWRS) were discussed in the EIS and commented on by North Dakota State agencies and private organizations as well as national organizations whose membership includes many North Dakotans.

d. No separate environmental statements or assessments have been prepared for North Dakota.

AFFIDAVIT OF WILLIAM L. GUY

Before me personally appeared William L. Guy, 1061 North Third Street, Casselton, North Dakota, who being duly sworn, deposed and said:

1. I was the Governor of the State of North Dakota from 1961 through 1972. As Governor, I was Chief Executive Officer of the State and was responsible for the supervision of the official conduct of all executive officers of the State.

2. Pursuant to 16 U.S.C. §715k5, no land may be acquired in the State of North Dakota with moneys from the Migratory Bird Conservation Fund unless the acquisition "has been approved by the Governor of the State or the appropriate State agency." During my twelve years as Governor of the State of North Dakota, I approved and disapproved the acquisition of thousands of acres of wetlands and adjoining uplands by the Secretary of the Interior with moneys from the Migratory Bird Conservation Fund. It was my opinion that 16 U.S.C. §715k5 applied to *any* acquisition by the Fish and Wildlife Service with moneys from the Migratory Bird Conservation Fund, whether it be a fee acquisition for a refuge, an easement for a waterfowl production area, or any other acquisition.

3. I reserved the right, during my administration, to personally approve or disapprove fee acquisitions by the Fish and Wildlife Service.

4. The acquisition of easements by the Fish and Wildlife Service, however, were handled in a different manner. I signed certain authorizations for the Fish and Wildlife Service to acquire easements up to a specified acreage in each county. The authorizations were designed to equitably distribute the acquisition of easements by the Fish and Wildlife Service, thereby preventing a concentration of acquisition activities in only a few counties. In effect, the authorizations were also planning documents for the benefit of county commissioners, state officials, and the public.

5. The authorizations contained the following language:

> I, William L. Guy, Governor of the State of North Dakota, in accordance with the provisions of the Act of October 4, 1961, 75 Stat. 813, hereby grant approval to the acquisition of easements by the United States of America of any lands within the county of _____, State of North Dakota, for Waterfowl Production Area purposes not to exceed _____ [a specified number of] acres of wetlands.

6. The "Memorandum in Opposition to Defendant's Motion to Dismiss" recently filed by the United States states the following:

> The Fish and Wildlife Service does not need the approval of the Governor for further acquisition of permanent waterfowl easements. The reason is the Governor of the State of North Dakota has already given *full and unconditional* approval to the Fish and Wildlife Service for the acquisition of *permanent* waterfowl easements of an *acreage sufficient to fulfill its acquisition goals* in the State of North Dakota (Complaint, para. 8; Plaintiff's Answers to Defendant's First Set of Interrogatories and Response to Defendant's First Request of Production of Documents, Answers to Interrogatory No. 1, filed July 20, 1979.)
>
> The Governor in his affidavit correctly points out that the Wetlands Loan Act provides that no lands shall be acquired with funds appropriated as an advance for the Migratory Bird Conservation Fund unless such acquisitions have been approved by "the Governor of the State *or* the appropriate State agency." (16 U.S.C. §715k-5; emphasis added). However, between 1961 and 1964 *full and unconditional approval* for the acquisition of waterfowl *easements* was granted on a county by county basis by Governor William Guy or Game and Fish Commissioner Russell W. Stuart as an authorized representative of the Governor (Answers to Interrogatory No. 1, *supra*).

Therefore, ...approval has already been granted for the acquisition of waterfowl easements....(Emphasis added)

7. I disagree completely with conclusions stated in the extract from the memorandum quoted above.

a. It was never my intention that the authorizations (mentioned in paragraphs 3 - 6, above) would convey "full and unconditional approval to the Fish and Wildlife Service for the acquisition of ... waterfowl easements". The authorizations were to be effective until modified or rescinded by me. I did not intend to bind my successor to these authorizations; further, it was my opinion that I could not bind my successor to such actions. It is apparent to me that the term "full and unconditional" is a self serving editorial comment by the author of the memorandum; the term "full and unconditional" cannot be found in any authorization which has been signed by me.

b. The term "permanent waterfowl easement" is utilized in the memorandum. I did not authorize the acquisition of only permanent waterfowl easements. Many of the easements which were secured were of limited duration, such as 99 years.

c. The authorizations were not "of an acreage sufficient to fulfill its [the Fish and Wildlife Service] goals in the State of North Dakota. The authorizations were only acquisitions up to a specified acreage. I did not know what the goals of the Fish and Wildlife Service were since the acquisition goals and policies of that agency frequently changed.

Dated this 3rd day of August, 1979.

/s/ William L. Guy

AFFIDAVIT OF DAVID SPRYNCZYNATYK

Before me personally appeared David Sprynczynatyk, who being duly sworn, deposed and said:

1. I am the acting State Engineer for the State of North Dakota.

2. I have reviewed the history of the Lake Alice National Wildlife Refuge from documents in the files of the State Water Commission.

3. The State Water Commission held a public meeting concerning the Lake Alice National Wildlife Refuge on June 21, 1972. The statement presented by the Fish and Wildlife Service is attached as Exhibit 1.

4. The State Water Comission recommended conditional approval of the proposed acquisitions for the refuge (an extract from the minutes of the June 21, 1972, meeting is attached as Exhibit 2). It is clear from the minutes that the State Water Commission conditioned their approval on cooperation from the Fish and Wildlife Service for water management activities in the basin, including the Starkweather Watershed Project.

5. On June 26, 1972, Governor Guy approved, pursuant to 16 U.S.C. §715k-5, the proposed refuge acquisitions. The letter of approval is attached as Exhibit 3.

6. Immediately after the assurances of cooperation by the Fish and Wildlife Service concerning water management in the Devils Lake Basin (given when seeking approval for land acquisitions for the Lake Alice National Wildlife Refuge), the Fish and Wildlife Service withdrew support for the Starkweather Watershed Project.

7. Flood control efforts were initiated in the Devils Lake Basin soon after settlement. However, state water commission records do not contain significant information about activities prior to 1951.

8. A January 5, 1951, memorandum of the U.S. Soil Conservation Service (SCS) indicates landowners in Ramsey County filed a petition with the Ramsey Count Drain Board in 1950 for a flood control project. In May, 1951, a State Water Commission (SWC) memorandum outlined a specific proposal for a channel from Dry Lake to Devils Lake.

9. The SWC, on April 25, 1955, passed a resolution requesting the Corps of Engineers (Corps) to "plan and construct facilities which will prevent the flooding of the lands within the [Devils Lake Basin]." However, proposals by the Corps later fell into disfavor and were abandoned.

10. The North Dakota Game and Fish Department, the SCS, the Bureau of Sport Fisheries and Wildlife (FWS) and the SWC executed a declaration of intent on February 10, 1966, for the preliminary investigation of the feasibility of development of a watershed plan for the Edmore-Starkweather Watershed. Over a year later, on September 8, 1967, the SCS indicated by letter that it was authorized to provide detailed planning assistance for watershed management in the Starkweather Watershed.

11. Correspondence from the FWS indicates it clearly did not favor any Starkweather Watershed project, but early federal, state, and local attempts to resolve the flooding problem in the Devils Lake Basin resulted in "The Starkweather Watershed Preliminary Planning Criteria" which was executed by the Starkweather Watershed Sponsoring Group, the FWS, the SCS, the ND G&F, and the SWC. Among other things, the agreement provided for best management practices on farmland and acquisition of wetlands. In addition, the agreement stated: "Wetlands to be preserved and areas needed for mitigation development will be acquired by easement or purchase for each construction entity or segment before construction bids are let."

12. Specific terms for a mitigation plan were subsequently developed in a document entitled "Agreement on Criteria for

Wetlands Acquisition in the Starkweather Watershed." The agreement is attached as Exhibit 4.

13. Pursuant to the agreement, wetlands were acquired in the Watershed. In May, 1972, Governor Guy was advised by the regional director of the FWS that the wetland acquisition goal had been met. An article in the May 30, 1972, Devils Lake Journal stated:

> BISMARK—Travis Roberts, regional director of the federal Bureau of Sport Fisheries and Wildlife, (BSFW), told Gov. William L. Guy today that the Bureau has acquired its share of wetland credit acres needed for the Starkweather Watershed project north of Devils Lake. Roberts met with Guy, State Game and Fish Commissioner Russell Stuart and State Water Commission Secretary Milo Hoisveen, according to Associated Press.
>
> Roberts disclosed that BSFW had acquired the needed wetlands, along with 2,000 acres previously brought under easement by the Sweetwater-Dry Lake Water Management District to complete the goal of 13,500 wetland credit acres set for the BSFW in the planning of the watershed project.
>
> "I am pleased that after so many years of work and planning, the Starkweather project can now proceed in earnest," the governor said.
>
> * * *
>
> The acquisition of the required wetland credit acres, clears a major obstacle out of the path of the Starkweather Watershed project. The wetlands preservation measures have been one of the more controversial aspects of the channel improvement and flood control project since its inception many years ago.

14. However, in December of the same year the Department of the Interior reversed its position and objected to the project.

A December 12, 1972, letter from Secretary of the Interior Morton to the Secretary of Agriculture Butz stated, in part:

> The Starkweather Watershed Project, Ramsey and Cavalier Counties, North Dakota, presently being planned under the authority of P.L. 83-566, poses problems of grave concern to this Department. . . .
>
> Specifically, and of greatest concern, the Starkweather Project will cause systematic and unwarranted losses of natural prairie marsh resources in the pothole area of North America. In anticipation of the construction of this project, the Bureau of Sport Fisheries and Wildlife has conducted an accelerated program of wetland acquisition. By purchasing easements or fee title with Duck Stamp funds the Bureau has insured the preservation of 6,472 acres of wetlands out of the 18,400 acres that still remain undrained within the Starkweather watershed, this in accordance with an agreement between the project sponsors and the Bureau. The project sponsors had agreed to preserve an additional 2,000 acres, but it appears that only about 1,360 of these have been protected to date.
>
> In our further review of the project and the draft environmental statement we find that the ultimate impact would be far greater than that of the Starkweather watershed alone. The channels to be built for the Starkweather Project would also provide outlets for the drainage of the Edmore watershed as well as the area lying between Edmore and Starkweather. An additional 27,300 acres of top quality wetlands could be drained, a factor which the draft environmental statement fails to consider.
>
> • • •
>
> We estimate that the Starkweather Project could result in the loss of up to 71 percent of the remaining wetlands in the Starkweather-Edmore drainage area. Furthermore, it

would reduce the water levels of Dry Lake and the lakes and marshes to the west, including our recently acquired Federal wildlife refuge at Lake Alice. . . .

In conclusion, we believe that there are vital environmental factors pertaining to the Starkweather Project which give this Department strong reason to oppose it in its present form. At the very least we feel that the circumstances require a thorough reevaluation of the project, its relationship to projects and programs of other Departments, its mitigation features and alternative ways of accomplishing its goals.

15. The SCS work on the project was suspended nearly a year later, on November 9, 1973.

16. Immediately therafter, on November 21, 1973, Governor Link wrote to Secretary Morton expressing his dismay about the Department of Interior's new position and lack of good faith. He said, in part:

I have reviewed the history of the Starkweather-Edmore Watershed Project and it is with a great sense of disappointment that I learn of the suspension of this project due to the continuing opposition by the Bureau of Sport Fisheries and Wildlife, United States Department of the Interior.

As you know, continuing efforts have been made for nearly twenty years by the local water management districts to resolve any conflicts involved and to proceed with the construction of this project.

On March 16, 1970, Mr. James McBroom of the Bureau of Sport Fisheries and Wildlife stated in a letter to former Governor Guy, "If all parties to the Agreement carry out their work in good faith, we should have the needed flood protection there plus wetland preservation for waterfowl. It will be a model for the whole Nation."

In June of 1972, Mr. Travis Roberts of the Bureau of Sport Fisheries and Wildlife informed the Soil Conservation Service that wetland acquisition was completed. I must express to you my regret that the Department of the Interior felt it must recede from this notice of approval.

Assistant Secretary Reed's position that he was not bound by previous decisions was very surprising to many North Dakotans who had previously accepted, in good faith, agreements with the Bureau of Sport Fisheries and Wildlife that they assumed would be complied with on both sides.

* * *

The local sponsors of this project believe that if this project is to be stopped, the easements and land purchased for mitigation by the Bureau of Sport Fisheries and Wildlife should be released. The Ramsey County Commissioners approved the sale of these lands on the basis that this land would be counted as mitigation for construction and completion of the Starkweather Watershed. They believe that if the Bureau now withdraws its previous approval, the easements and purchased land obtained with the understanding that the project would be approved should be returned to the the local landowners.

On a personal note, I regret the necessity of sending this letter to you. I had hoped that this entire matter could be resolved with good faith being exhibited on both sides.

17. The responsive position is summarized in a March 22, 1974, article in the Devils Lake Journal:

The U.S. Department of Interior has stated its opposition to the release of wetland easements which were acquired as part of the agreement for the Starkweather Watershed Project in Ramsey and Cavalier counties.

In a letter to North Dakota Sen. Milton R. Young (R), Curtis Bohlen, deputy assistant secretary for Fish and Wildlife and Parks, said fee and easement purchases "were individual transactions with landowners, separate and apart from the overall agreement." He added that while the watershed agreement was instrumental in obtaining former Gov. William Guy's approval of the wetland purchases, the Interior Department sees no justification for disposing of these lands since they still serve their program purpose—preservation of wetland habitat.

* * *

Bohlen noted that Interior reconsidered all aspects of the Starkweather project during a review of the environmental impact statement. He said that Interior believes the project would result in "much broader and widespread habitat degradation" than was originally believed.

"We understand the local flooding problems," Bohlen wrote, "but we must conclude that alternative solutions that would be less environmentally damaging were not given adequate consideration in project formulation."

Bohlen added that Interior believes early decisions made with regard to the Starkweather project were "injurious to the national interest" and he said every attempt must be made to take corrective action.

18. After federal support for flood control in the basin was withdrawn, the State established the Devils Lake Basin Advisory Committee and provided funding for the construction of the Channel "A" project, a feature which had been part of the Starkweather Watershed Project.

19. Channel A has now been constructed, after an unsuccessful legal challenge. *National Wildlife* v. *Alexander, et al.*, ____ F.2d ____ (D.C. Cir. 1979).

/s/ David Sprynczynctzk

ANSWER AND COUNTERCLAIM

I. ANSWER

The defendant answers the numbered paragraphs of the Complaint as follows:

1-2. This is a legal statement not requiring a response.

3-4. Admit.

5-7. The statements contained in these paragraphs are conclusions of law to which no response is required.

8. Deny.

9. Admit.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment.

11. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment. However, answers to interrogatories indicate that the "total acreage described in the permanent easements for waterfowl production areas acquired in North Dakota by the Fish and Wildlife Service, USDI, is 4,788,300 acres. . . ."

12. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment.

13-14. Admit.

15-21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averment.

22. Deny.

Unless statements are specifically admitted or unless statements do not require a response, all allegations in this complaint are denied.

The complaint fails to allege a continuing case or controversy.

II. COUNTERCLAIM

Introduction, Applicable Statutes and Jurisdiction

1. This is a counterclaim wherein the State of North Dakota seeks declaratory and injunctive relief from plaintiff's arbitrary and capricious actions concerning land acquisition programs in the State of North Dakota.

2. This action arises under the Administrative Procedure Act (APA), 5 U.S.C. §§701-706.

3. Jurisdiction is founded on 28 U.S.C. §1331 (federal question) and 28 U.S.C. §§2201 and 2202 (declaratory judgment and further relief).

4. Venue is proper under 28 U.S.C. §1391.

Factual Background

5. Acquisition of federal land in North Dakota for fish and wildlife purposes is an extremely controversial issue. The controversy is due, in part, to the frequent lack of federal concern to local interests. The controversy is also due, in part, to the magnitude of Fish and Wildlife Service (FWS) holdings: answers to interrogatories indicate that the FWS owns or controls (fee or easement) 5,320,751 acres (8,313.67 square miles) in North Dakota.

6. Legislative concern regarding FWS acquisitions led to Legislative Council interim study during 1975-1976.

7. The interim committee recommended legislation which was similar to the law being challenged by the United States. The Legislative Assembly modified and approved the proposed legislation, and it was signed into law by the Governor (SB 2016; Ch. 204, 1977 S.L.).

8. Senate Bill 2016 contained three sections:

a. to amend and reenact §20.1-02-18, thereby withdrawing the state's unconditional consent to the United States' acquisition of areas for migratory bird reservations;

b. to create and enact §20.1-02-18.1 to provide, among other things, for public participation in the land acquisition process; and

c. to create and enact §20.1-02-18.2 to, among other things, place limitations upon certain easements acquired with moneys from the migratory Bird Conservation Fund *and* to terminate the state's conditional consent in §20.1-02-18 if the United States failed "to agree to and comply with" the provisions of §20.1-02-18.2.

9. Section 20.1-02-18 of the North Dakota Century Code now states:

> 20.1-02-18. STATE'S CONDITIONAL CONSENT TO UNITED STATES' ACQUISITION OF AREAS FOR MIGRATORY BIRD RESERVATIONS—STATE RETAINS JURISDICTION.—North Dakota consents, subject to the conditions of sections 20.1-02-18.1 and 20.1-02-18.2, to the United States acquiring, by purchase, gift, devise, or lease, land or water in this state as the United States may deem necessary to establish migratory bird reservations in accordance with the federal Migratory Bird Conservation Act [Pub. L. 70-770; 45 Stat. 1222; 16 U.S.C. 715 et seq.]. North Dakota reserves such full and complete jurisdiction and authority over all such areas of land or water so acquired by the United States as is not incompatible with the administration, maintenance, protection, and control of such areas by the United States under the terms of said Act of Congress.

10. Section 20.1-02-18.2 of the North Dakota Century Code now states:

20.1-02-18.2. NEGOTIATION OF LEASES, EASEMENTS, AND SERVITUDES FOR WILDLIFE PRODUCTION PURPOSES.—A landowner may negotiate the terms of a lease, easement, or servitude for land, wetland, or water areas sought to be acquired by the United States department of the interior, its bureaus or agencies, with moneys from the migratory bird conservation fund [16 U.S.C. 718d] for use as waterfowl production areas, wildlife refuges, or for other wildlife purposes. A landowner may:

1. Negotiate the time period of the lease, easement, or servitude being sought. A lease, easement, or servitude shall terminate upon the death of a landowner or upon change of ownership.

2. Restrict a lease, easement, or servitude by legal description to the land, wetland, or water areas being sought, and may drain any after-expanded wetland or water area in excess of the legal description in the lease, easement, or servitude.

Failure by the department of the interior, its bureaus or agencies, to agree to and comply with the above provisions shall nullify North Dakota's consent to the federal act under section 20.1-02-18.

11. The United States of America, "at the request of the Secretary of the Interior of the United States" (preamble to the complaint), filed this action to declare §20.1-02-18.2 and other state laws "aberrant and hostile" and "without any force and effect" upon the acquisition of certain interests in land by the Secretary of the Interior.

12. This action constitutes "[f]ailure by the department of the interior, its bureaus or agencies, to agree to and comply with" the provisions of §20.1-02-18.2, thereby "nullify[ing] North Dakota's consent to the federal acts under Section 20.1-02-18."

13. State consent is required for certain acquisitions by the Secretary of the Interior pursuant to 16 U.S.C. §715f:

> §715f. CONSENT OF STATE TO CONVEYANCE.
>
> No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under sections 715 to 715d, 715e, 715f to 715k and 715l to 715r of this title unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.

14. Despite such nullification and the mandate of 16 U.S.C. §715f, the Interior, in an arbitrary and capricious manner, has determined to acquire by condemnation land for the Lake Alice National Wildlife Refuge. In a January, 1980 letter to Governor Link, the FWS Area Manager stated:

> On June 2, 1978, Area Manager William Aultfather advised you by letter of our plans to complete acquisition of the Lake Alice National Wildlife Refuge in Ramsey and Towner Counties. He mentioned in the letter that every effort would be made to complete acquisition on a mutually acceptable negotiated basis; but, if negotiations were not successful, court action would be necessary.
>
> Between 1972, when the project was approved by Governor William Guy and the Migratory Bird Conservation Commission, and August 1978, 13 tracts consisting of 7,068.49 acres were acquired from willing sellers. Since August 1978, intensive negotiations with the remaining landowners have resulted in the acquisition of one additional parcel of land, bringing the total under jurisdiction of the United States to 7,391.09 acres in 14 tracts.
>
> Negotiations on the remaining five tracts appear to be at a stalemate. Unfortunately, these are all key tracts that must be acquired before the refuge can be developed and managed to its full potential.

> We have been advised by our Regional and Central Offices that acquisition and development funds are available for fiscal year 1980. Since further negotiations appear to be futile at this point, we have no other choice but to initiate court action to acquire the remaining tracts. The affected landowners have received their final offers and have been informed of the impending litigation. Any counteroffers received before the cases are actually filed will be carefully considered and every effort will be made to reach mutually acceptable agreements if at all possible. We will continue to keep you informed of the progress being made in this acquisition.

15. Federal law also requires consent of a Governor for certain acquisitions. Section 715k-5 of Title 16 provides:

> No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate agency.

16. Neither Governor Link, the present governor of the State of North Dakota, nor any appropriate state agency, has ever approved the acquisition identified in paragraph 14, above.

17. Neither the State of North Dakota nor the present governor of the State of North Dakota has consented to the additional acquisition of land by the United States or the Lake Alice National Wildlife Refuge, although the consent of both is required by federal law.

Wherefore, the State of North Dakota prays for a judgment against the United States:

1. Enjoining the United States from acquiring — by purchase, condemnation or any other means — lands in the State of North Dakota pursuant to 16 U.S.C. §§715 to 715d, 715e, 715f to 715k and 715l to 715r until the state again consents to such acquisitions.

Enjoining the Secretary of the Interior from accepting any deed or instrument of conveyance to lands in the State of North Dakota pursuant to 16 U.S.C. §§715 to 715d, 715e, 715f to 715k and 715l to 715r until the state again consents to such acquisitions.

3. Enjoining the Secretary of the Interior from expending any funds from the Migratory Bird Conservation Fund for the acquisition of interests in land in North Dakota unless the Governor of the State of North Dakota or the appropriate State agency shall have consented to such acquisition.

4. Granting all further and general relief to the State of North Dakota as the Court may deem just and proper.

5. Awarding to the State of North Dakota its costs expended herein.

Dated this 13th of February, 1980.

ALLEN I. OLSON
ATTORNEY GENERAL

/s/ MURRAY G. SAGSVEEN
Solicitor
Office of the Attorney General
State Capitol
Bismarck, North Dakota 58505

STIPULATION

Both parties believing that the issues involved in this action are essentially legal, and that there is no substantial factual dispute, and to facilitate submission of this action to the Court for decision, hereby stipulate to the following:

1. The United States Fish and Wildlife Service, United States Department of Interior, has since July 1, 1977, sought to acquire *in fee* 13 tracts of land under authority of 16 U.S.C. Section 718d(c). Such tracts total approximately 1,274.13 acres, of which approximately 355 acres (or 28%) are wetlands. The approval of the Governor of the State of North Dakota has been sought by the United States Fish and Wildlife Service for said acquisitions, but to the date of this stipulation the Governor of the State of North Dakota has declined to approve the proposed fee acquisitions. On the 7th day of March, 1980, all 13 proposed acquisitions were returned to the State of North Dakota for review, however, no further action has yet been taken with regard to the same by the State of North Dakota.

2. For the reasons set forth in paragraphs 15 and 16 of the Complaint, the United States Fish and Wildlife Service has not acquired any *easements* under 16 U.S.C. Section 718d(c) since July 1, 1977.

3. While the United States Fish and Wildlife Service has not requested the approval of the Governor of the State of North Dakota for any proposed easement acquisitions under 16 U.S.C. Section 718d(c) since July 1, 1977, it is the United States of America's legal position that if such consent is required under 16 U.S.C. Section 715k-5, the United States has already obtained all of the consent that is needed as per the consent forms attached to answers to Plaintiff's Interrogatory No. 1, that these consents have not been cancelled and remain in full force and effect, and further, that they cannot now be unilaterally cancelled by the State of North Dakota. It is the State's legal position that the Governor's consent for acquisi-

tion of easements is required, that the consent forms attached to the answers to Interrogatory No. 1 can legally be cancelled unilaterally by the State, that they have been cancelled, and that even if they have not been cancelled, they are not in and of themselves adequate for easement acquisitions under 16 U.S.C. Section 715k-5.

4. The parties do not believe that there is any further evidence that need be submitted to the Court in this action and that the Court can reach a decision on the merits based upon the pleadings, briefs of the parties filed with regard to the various motions which have been submitted, affidavits, answer to interrogatories, and exhibits attached to said affidavits and answers. The parties do not object on the basis of foundation to any evidence which has previously been submitted in the form of affidavits, answers to interrogatories, and exhibits attached to such affidavits and answers to interrogatories. All appropriate objections as to relevancy and competency of such evidence, however, shall be deemed by the Court as having been made by the appropriate party.

5. The parties agree that the claim of the United States, made by the United States in its Complaint, and the counterclaim, made by the State of North Dakota in its Answer, may be considered separately by the Court, and that the counterclaim will not be considered for disposition on its merits until after such time as the United States' answer or other proper response to the merits of the counterclaim is due.

6. Both parties reserve the right to file, within 15 days of the filing of this stipulation, a brief statement summarizing its factual and legal position with regard to the issues presented by the Plaintiff's Complaint.

Dated this 21 day of March, 1980.

JAMES R. BRITTON
United States Attorney

/s/ LYNN E. CROOKS
Assistant United States Attorney
219 Federal Bldg. & U.S. Courthouse
P. O. Box 2505
Fargo, North Dakota 58108

/s/ JOHN E. LINDSKOLD
Attorney, Department of Justice
Land and Natural Resources Division
Washington, D. C. 20530

Dated This 24th day of March, 1980.

ALLEN I. OLSON
ATTORNEY GENERAL OF NORTH DAKOTA

/s/ MURRAY G. SAGSVEEN
Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505

Relevant Constitutional Provisions, Laws And Regulations

U.S. Const. Art. VI, cl. 2:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land...

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16 U.S.C. § 668dd. National Wildlife Refuge System

(a) Designation; administration; continuance of resources-management-programs for refuge lands in Alaska; disposal of acquired lands; proceeds

(1) For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary of the Interior for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System"), which shall be subject to the provisions of this section, and shall be administered by the Secretary through the United States Fish and Wildlife Service. With respect to refuge lands in the State of Alaska, those programs relating to the management of resources for which any other agency of the Federal Government exercises administrative responsibility through cooperative agreement shall remain in effect, subject to the direct supervision of the United States Fish and Wildlife Service, as long as such agency agrees to exercise such responsibility.

(2) No acquired lands which are or become a part of the System may be transferred or otherwise disposed of under any

provision of law (except by exchange pursuant to subsection (b)(3) of this section) unless—

(A) the Secretary of the Interior determines with the approval of the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established; and

(B) such lands are transferred or otherwise disposed of for an amount not less than—

(i) the acquisition costs of such lands, in the case of lands of the System which were purchased by the United States with funds from the migratory bird conservation fund, or fair market value, whichever is greater; or

(ii) the fair market value of such lands (as determined by the Secretary as of the date of the transfer or disposal), in the case of lands of the System which were donated to the System.

The Secretary shall pay into the migratory bird conservation fund the aggregate amount of the proceeds of any transfer or disposal referred to in the preceding sentence.

(3) Each area which is included within the System on January 1, 1975, or thereafter, and which was or is—

(A) designated as an area within such System by law, Executive order, or secretarial order; or

(B) so included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,

shall continue to be a part of the System until otherwise specified by Act of Congress, except that nothing in this paragraph shall be construed as precluding—

(i) the transfer or disposal of acquired lands within any such area pursuant to paragraph (2) of this subsection;

(ii) the exchange of lands within any such area pusuant to subsection (b)(3) of this section; or

(iii) the disposal of any lands within any such area pursuant to the terms of any cooperative agreement referred to in subparagraph (B) of this paragraph.

(b) Administration; public accommodations contracts; acceptance and use of funds; exchange of properties; cash equalization payments

In administering the System, the Secretary is authorized—

(1) to enter into contracts with any person or pub'ic or private agency through negotiation for the provision of public accommodations when, and in such locations, and to the extent that the Secretary determines will not be inconsistent with the primary purpose for which the affected area was established.

(2) to accept donations of funds and to use such funds to acquire or manage lands or interests therein, and

(3) to acquire lands or interests therein by exchange (A) for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be suitable for disposition, or (B) for the right to remove, in accordance with such terms and conditions as he may prescribe, products from the acquired or public lands within the System. The values of the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

(c) Prohibited and permitted activities; application of mining and mineral leasing laws, hunting or fishing regulations, and State laws or regulations

No person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; or take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area; or enter, use, or otherwise occupy any such area for any purpose; unless such activities are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section or by express provision of the law, proclamation, Executive order, or public land order establishing the area, or amendment thereof: *Provided,* That the United States mining and mineral leasing laws shall continue to apply to any lands within the System to the same extent they apply prior to October 15, 1966, unless subsequently withdrawn under other authority of law. With the exception of endangered species and threatened species listed by the Secretary pursuant to section 1533 of this title in States wherein a cooperative agreement does not exist pursuant to section 1535(c) of this title, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and wildlife on lands not within the system. The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.

(d) Use of areas; administration of migratory bird sanctuaries as game taking areas; rights of way, easements, and reservations; payment of fair market value

(1) The Secretary is authorized, under such regulations as he may prescribe, to—

(A) permit the use of any area within the System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established: *Provided,* That not to exceed 40 per centum at any one time of any area that has been, or hereafter may be acquired, reserved, or set apart as an inviolate sanctuary for migratory birds, under any law, proclamation, Executive order, or public land order may be administered by the Secretary as an area within which the taking of migratory game birds may be permitted under such regulations as he may prescribe; and

(B) permit the use of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines, telephone lines, canals, ditches, pipelines, and roads, including the construction, operation, and maintenance thereof, whenever he determines that such uses are compatible with the purposes for which these areas are established.

(2) Notwithstanding any other provision of law, the Secretary of the Interior may not grant to any Federal, State, or local agency or to any private individual or organization any right-of-way, easement, or reservation in, over, across, through, or under any area within the system in connection with any use permitted by him under paragraph (1)(B) of this subjection unless the grantee pays to the Secretary, at the option of the Secretary, either (A) in lump sum the fair market value (determined by the Secretary as of the date of conveyance to the grantee) of the right-of-way, easement, or reservation; or (B) annually in advance the fair market rental value (determined by the Secretary) of the right-of-way, easement, or reservation. If any Federal, State, or local agency is exempted from such payment by any other provision of Federal law, such agency shall

otherwise compensate the Secretary by any other means agreeable to the Secretary, including, but not limited to, making other land available or the loan of equipment or personnel; except that (A) any such compensation shall relate to, and be consistent with, the objectives of the National Wildlife Refuge System, and (B) the Secretary may waive such requirement for compensation if he finds such requirement impracticable or unnecessary. All sums received by the Secretary of the Interior pursuant of any necessary expenses incurred by him in adminstering this paragraph, be deposited into the Migratory Bird Conservation Fund and shall be available to carry out the provisions for land acquisition of the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.) and the Migratory Bird Hunting Stamp Act (16 U.S.C. 718 et seq.).

(e) Penalties

Any person who violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined not more than $500 or be imprisoned not more than six months, or both.

(f) Enforcement provision; arrests, searches, and seizures; custody of property; forfeitures; disposition

Any person authorized by the Secretary of the Interior to enforce the provisions of this Act or any regulations issued thereunder, may, without a warrant, arrest any person violating this Act or regulations in his presence or view, and may execute any warrant or other process issued by an officer or court of competence jurisdiction to enforce the provisions of this Act or regulations, and may with a search warrant search for and seize any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof, taken or possessed in violation of this Act or the regulations issued thereunder. Any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or egg thereof seized with or without a search warrant shall be held by such person or

by a United States marshal, and upon conviction, shall be forfeited to the United States and disposed of by the court.

(g) Regulations; continuation, modification, or rescision

Regulations applicable to areas of the System that are in effect on October 15, 1966, shall continue in effect until modified or rescinded.

(h) National conservation recreational area provisions; amendment, repeal, or modification

Nothing in this section shall be construed to amend, repeal, or otherwise modify the provision of the Act of September 28, 1962 (76 Stat. 653; 16 U.S.C. 460K-460K-4) which authorizes the Secretary of the Interior to administer the areas within the System for public recreation. The provisions of this section relating to recreation shall be administered in accordance with the provisions of said sections.

(i) Exemption from State water laws

Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

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16 U.S.C. § 715f. Consent of State to conveyance

No deed or instrument of conveyance shall be accepted by the Secretary of the Interior under this subchapter unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.

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16 U.S.C. § 715k-5. Advance to migratory bird conservation fund; repayments; acquisition of lands

Funds appropriated pursuant to sections 715k-3 to 715k-5 of this title shall be treated as an advance, without interest, to the

migratory bird conservation fund. Such appropriated funds, beginning on October 1, 1983, shall be repaid to the Treasury out of the migratory bird conservation fund, such repayment shall be made in annual amounts comprising 75 per centum of the moneys accruing annually to such fund. In the event the full amount authorized by section 715k-3 of this title is appropriated before October 1, 1983, the repayment of such funds pursuant to this section shall begin with the next full fiscal year. No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency.

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16 U.S.C. § 715s. Participation of local governments in revenue from areas administered by the United States Fish and Wildlife Service

(a) Separate fund in United States Treasury; availability of funds until expended; definition of "National Wildlife Refuge System"

Beginning with the next full fiscal year and for each fiscal year thereafter, all revenues received by the Secretary of the Interior from the sale or other disposition of animals, salmonoid carcassas,[1] timber, hay, grass, or other products of the soil, minerals, shells, sand, or gravel, from other privileges, or from leases for public accommodations or facilities incidental to but not in conflict with the basic purposes for which those areas of the National Wildlife Refuge System were established, during each fiscal year in connection with the operation and management of those areas of the National Wildlife Refuge System, National Fish Hatcheries, or other areas, that are solely or primarily administered by him, through the United States Fish and Wildlife Service, shall be covered into the United States Treasury and be reserved in a separate fund for disposition as hereafter prescribed. Amounts in the fund shall remain available until expended, and may be expended by the Secretary without further appropriation in the manner hereafter prescribed.

The National Wildlife Refuge System (hereafter referred to as the "system") includes those lands and waters administered by the Secretary as wildlife refuges, lands acquired or reserved for the protection and conservation of fish and wildlife that are listed pursuant to section 1533 of this title as endangered species or threatened species, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any law, proclamation. Executive, or public land order.

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16 U.S.C. § 718d. Disposition of receipts from sale of stamps

All moneys received for such stamps shall be accounted for by the Postal Service or the Department of the Interior, whichever is appropriate, and paid into the Treasury of the United States, and shall be reserved and set aside as a special fund to be known as the migratory bird conservation fund, to be administered by the Secretary of the Interior. All moneys received into such fund are appropriated for the following objects and shall be available therefor until expended:

(a) Advance allotments to Postal Service

So much as may be necessary shall be used by the Secretary of the Interior to make advance allotments to the Postal Service at such times and in such amounts as may be mutually agreed upon by the Secretary of the Interior and the Postal Service for direct expenditure by the Postal Service for engraving, printing, issuing, selling, and accounting for migratory bird hunting stamps and moneys received from the sale thereof, in addition to expenses for personal services in the District of Columbia and elsewhere, and such other expenses as may be necessary in executing the duties and functions required of the Postal Service.

(b) Acquisition of bird refuges

Except as authorized in subsection (c) of this section, the remainder shall be available for the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under

the provisions of the Migratory Bird Conservation Act [16 U.S.C. 715 et seq.] and for the administrative costs incurred in the acquisition of such areas.

(c) Waterfowl Production Areas

The Secretary of the Interior is authorized to utilize funds made available under subsection (b) of this section for the purposes of such subsection, and such other funds as may be appropriated for the purposes of such subsection, or of this subjection, to acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange of, small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto. Such small areas, to be designated as "Waterfowl Production Areas", may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act [16 U.S.C. 715 et seq.], but all of the provisions of such Act which govern the administration and protection of lands acquired thereunder, except the inviolate sanctuary provisions of such Act, shall be applicable to areas acquired pursuant to this subsection.

MIGRATORY WATERFOWL—CONSERVATION

PUBLIC LAW 87-383; 75 STAT. 813

[H.R. 7391]

An Act to promote the conservation of migratory waterfowl by the acquisition of wetlands and other essential waterfowl habitat, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

In order to promote the conservation of migratory waterfowl and to offset or prevent the serious loss of important wetlands and other waterfowl habitat essential to the preservation of such

waterfowl, there is hereby authorized to be appropriated for the seven-year period beginning with fiscal year 1962, not to exceed $105,000,000.

Sec. 2. Funds appropriated each fiscal year pursuant to this Act shall be accounted for, added to, and used for purposes of the migratory bird conservation fund established pursuant to section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended (48 Stat. 451; 16 U.S.C. 718d).

Sec. 3. Funds appropriated pursuant to this Act shall be treated as an advance, without interest, to the migratory bird conservation fund. Such appropriated funds, beginning with fiscal year 1969, shall be repaid to the Treasury out of the migratory bird conservation fund, and such repayment shall be made in annual amounts comprising 75 per centum of the moneys accruing annually to such fund: *Provided,* That in the event the full amount authorized by section 1 of this Act is appropriated prior to the end of the aforesaid seven-year period, the repayment of such funds pursuant to this section shall begin with the next full fiscal year: *Provided further,* That no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency.

Approved October 4, 1961.

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
JAN 19 1982
ALEXANDER L. STEVAS,

No. 81-773

In the Supreme Court of the United States

OCTOBER TERM, 1981

NORTH DAKOTA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether gubernatorial consent to the United States' acquisition of interests in land in North Dakota for use as waterfowl production areas pursuant to 16 U.S.C. 718d(c) remains in effect.

2. Whether legislation enacted by North Dakota in 1977 that purports to restrict federal authority to acquire interests in land in that state for waterfowl production areas, which acquisitions had already been approved by the Governor of North Dakota, conflicts with federal statutory objectives and, therefore, is ineffective under the Supremacy Clause of the United States Constitution.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Constitutional and statutory provisions involved 2

Statement 2

Argument 8

Conclusion 11

TABLE OF AUTHORITIES

Cases:

Hancock v. *Train*, 426 U.S. 167 9

Missouri v. *Holland*, 252 U.S. 416 3

Nash v. *Florida Industrial Commission*, 389 U.S. 235 11

Swan Lake Hunting Club v. *United States*, 381 F. 2d 238 9

United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 11

Constitution, treaties and statutes:

United States Constitution, Article VI, Clause 2 ..... 2, 11

Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-Union of Soviet Socialist Republics, 29 U.S.T. 4647, T.I.A.S. No. 9073 2

Convention for the Protection of Migratory Birds, Aug 16, 1916, United States-Great Britain, 39 Stat. 1702 3

Page

Constitution, treaties and statutes—Continued:

Convention for the Protection of Birds and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 2-3

Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912 3

Migratory Bird Hunting Stamp Act of 1934, 16 U.S.C. (& Supp. III) 718 *et seq.* 3

16 U.S.C. 718a 3

16 U.S.C. 718d 3, 7

16 U.S.C. 718d(a) 4

16 U.S.C. 718d(b) 4

16 U.S.C. 718d(c) 4, 5, 7, 8

Migratory Bird Conservation Act, 16 U.S.C. (& Supp. III) 715 *et seq.* 3

16 U.S.C. 715a 3

16 U.S.C. 715d 3

16 U.S.C. 715f 3, 7, 8

Wetlands Act of 1961, 16 U.S.C. (& 1964 ed.) 715k-3 to 715k-5 4

16 U.S.C. 715k-5 ..... 4, 8, 9

16 U.S.C. 701 2

Page

Constitution, treaties and statutes—Continued:

N.D. Cent. Code (1978):

§ 20.1-02-18 ..... 5, 6

§ 20.1-02-18.1 ..... 5, 6, 10

§ 20.1-02.18.2 ..... 5, 6

§ 20.1-02-18.2.1 10

§ 47-05-02.1 ..... 5, 6

§ 47-05-02.1.2 10

1931 N.D. Sess. Laws ch. 207 3

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-773

NORTH DAKOTA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO AFFIRM

Pursuant to Rule 16.1 of the Rules of this Court, the United States moves that the judgment of the court of appeals be affirmed.

OPINIONS BELOW

The opinion of the court of apeals (J.S. App. 18a-32a) is reported at 650 F. 2d 911. The opinion of the district court (J.S. App. 8a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1981 (J.S. App. 18a), and a petitioner for rehearing was denied on July 21, 1981 (J.S. App. 32a). The notice of appeal (J.S. App. 33a) was filed on September 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

North Dakota appeals from a decision by the United States Court of Appeals for the Eighth Circuit sustaining the authority of the Secretary of the Interior to acquire interests in land in North Dakota in furtherance of a federal statutory program known as the "waterfowl production areas" program. The court of appeals, affirming the district court, held certain North Dakota statutes to be ineffective insofar as they purported to restrict federal acquisitions for that program.

1. The Secretary of the Interior is charged with the duty of preserving and restoring game birds and other wild birds. 16 U.S.C. 701. Over the years, Congress has enacted several statutes granting the Secretary comprehensive powers to conserve and restore migratory birds, including the authority to acquire lands and interests therein for the purpose of conserving migratory birds.[1] Three such statutes are relevant here.

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[1]The United States also has entered into several treaties that provide for the protection and conservation of migratory birds. See, *e.g.*, Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-Union of Soviet Socialist Republics, 29 U.S.T. 4647, T.I.A.S. No. 9073; Convention for the

a. The Migratory Bird Conservation Act (MBCA), 16 U.S.C. 715 (& Supp. III) *et seq.*, was enacted in 1929. That Act authorizes the Secretary to purchase or rent any area of land or water or any interest in any such area "for use as inviolate sanctuaries for migratory birds," where such purchase or rental has been approved by the Migratory Bird Conservation Commission established by the Act. 16 U.S.C. 715a, 715d. 16 U.S.C. 715f provides that

> [n]o deed or instrument of conveyance shall be accepted by the Secretary of the Interior under this subchapter unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.

In 1931, North Dakota gave its unconditional consent to the United States' acquisition "by purchase, gift, devise, or lease of such areas of land or water, or of land and water, in the State of North Dakota, as the United States may deem necessary for the establishment of migratory bird reservations in accordance with [the MBCA]." 1931 N.D. Sess. Laws ch. 207.

b. The Migratory Bird Hunting Stamp Act of 1934, popularly known as the "Duck Stamp Act," 16 U.S.C. (& Supp. III) 718 *et seq.*, requires hunters of wildfowl to purchase and carry with them while they are hunting special stamps. 16 U.S.C. 718a. The proceeds from the sale of the stamps are paid into the United States Treasury and set aside as a special fund known as the Migratory Bird Conservation Fund. 16 U.S.C. 718d. The fund is used to pay for

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Protection of Birds and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990; Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912; Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain, 39 Stat. 1702. See generally *Missouri* v. *Holland*, 252 U.S. 416 (1920).

administrative expenses (16 U.S.C. 718d(a)) and for "the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under the provisions of the Migratory Bird Conservation Act * * *" (16 U.S.C. 718d(b)).

In 1958, the Duck Stamp Act was amended by the addition of a subsection (c) to 16 U.S.C. 718d. The amendment provides for the United States' acquisition of a new category of lands known as "Waterfowl Production Areas," which the United States may acquire without regard to the limitations and requirements of the MBCA. Specifically, 16 U.S.C. 718d(c) authorizes the Secretary to use the Migratory Bird Conservation Fund to

> acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange of, small wetlands and pothole areas, interests therein, and rights-of-way to provide access thereto. Such small areas, to be designated as "Waterfowl Production Areas" may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act * * *, but all of the provisions of such Act which govern the administration and protection of lands acquired thereunder, except the inviolate sanctuary provisions of such Act, shall be applicable to areas acquired pursuant to this subsection.

c. Finally, the Wetlands Act of 1961, 16 U.S.C. (1964 ed.) 715k-3 to 715k-5, authorized the appropriation of moneys as interest-free advances to the Migratory Bird Conservation Fund. 16 U.S.C. 715k-5 concludes with the proviso that "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency."

2. A vital portion of the habitat of the Nation's migratory waterfowl is located in the north central states, predominantly in North Dakota. Accordingly, the Secretary, acting through the Fish and Wildlife Service of the Department of the Interior, has placed a high priority on purchasing easements in North Dakota under the waterfowl production areas acquisition program. To date, the Secretary has acquired more than 750,000 acres of permanent easements in North Dakota pursuant to 16 U.S.C. 718d(c) (J.S. App. 23a).

All of the waterfowl production areas that the United States has purchased in North Dakota have been acquired with the express consent of the Governor of that state or his authorized representative. Between 1961 and 1964, Governor Guy approved the United States' acquisition of waterfowl easements in each of North Dakota's 41 counties on a county-by-county basis, setting forth the maximum acreage that could be acquired in each county. Governor Link approved various acreage adjustments between 1973 and 1977. These consents permit the Fish and Wildlife Service to meet its planned acquisition objectives for waterfowl production areas in North Dakota (J.S. App. 23a, 28a n.13).

3. In 1977, North Dakota enacted legislation imposing several procedural requirements and substantive limitations on federal land acquisitions undertaken for the purpose of conserving waterfowl and wildlife. N.D. Cent. Code §§ 20.1-02-18 to 20.1-02-18.2, 47-05-02.1 (1978).

N.D. Cent. Code § 20.1-02-18.1 (1978) directs the Governor to submit requests from the Secretary of the Interior for land acquisition approvals to the board of county commissioners of the county in which the land sought to be acquired is located, and requires the Governor to obtain an affirmative recommendation by the board before he approves the acquisition. Section 20.1-02-18.1 also requires

the Secretary to submit a detailed impact analysis with the acquisition proposal and directs the county agent to prepare another impact analysis for the board of commissioners' consideration, the expense of which is to be borne by the Department of the Interior.

N.D. Cent. Code § 20.1-02-18.2 (1978) provides, *inter alia,* that a landowner may negotiate the terms of a lease, easement, or servitude sought to be acquired by the Department of the Interior with moneys from the Migratory Bird Conservation Fund.[2]

N.D. Cent. Code § 20.1-02-18 (1978) purports to subject the State's previous unconditional consent to the United States' acquisition of lands in North Dakota for purposes of the MBCA (see page 3, *supra*) to the conditions and limitations set forth in §§ 20.1-02-18.1 and 20.1-02-18.2.

Finally, N.D. Cent. Code § 47-05-02.1 (1978), among other things, restricts real property easements, servitudes, or any nonappurtenant restrictions on the use of real property that become binding after July 1, 1977, to a maximum duration of 99 years.

Shortly after North Dakota enacted this legislation, the United States negotiated a contract with a private landowner for the purchase of a permanent waterfowl easement over a 160-acre tract in North Dakota as a waterfowl production area, acquisition of which already had been authorized by the Governor (see page 5, *supra*). Because of the uncertainties concerning the landowner's ability to convey a permanent easement in light of the legislation, however, the United States did not finalize this negotiated conveyance

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[2]The most onerous aspect of this section, which provided that "[a] lease, easement, or servitude shall terminate upon the death of a landowner or upon change of ownership," was repealed in March 1981.

nor has it consummated other similar transactions. In fact, since 1977, the federal acquisition program in North Dakota has come to a virtual standstill.

4. The United States commenced this action in the United States District Court for the District of North Dakota, seeking a declaratory judgment to the effect that neither the 1977 state legislation nor 16 U.S.C. 715f (the state consent provision of the MBCA, see page 3, *supra*) is applicable to federal land acquisitions for waterfowl production areas pursuant to 16 U.S.C. 718d(c) that have received gubernatorial approval. The United States specifically alleged (Complaint, para. 8) that "[t]he Governor of the State of North Dakota has given unconditional approval to the Secretary of the Interior for the acquisition of waterfowl easements under [16 U.S.C. 718d] of an acreage sufficient to fulfill the goals of the [Department of the Interior] in North Dakota."

The district court entered summary judgment in favor of the United States (J.S. App. 8a-13a). The court held (*id.* at 11a) that neither state nor gubernatorial consent is a prerequisite to the United States' acquisition of interests in land for use as waterfowl production areas. The court further found (*id.* at 12a) that the 1977 legislation, insofar as it purports to restrict federal acquisitions for the waterfowl production areas program, "stand[s] as an obstacle to the accomplishment and execution of valid purposes and objectives of Congress" and, under the Supremacy Clause, must yield to the overriding federal law.[3]

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[3]The district court dismissed, for lack of jurisdiction, North Dakota's counterclaim for an injunction restricting the United States from condemning lands for the Lake Alice National Wildlife Refuge (J.S. App. 12a-13a). The court of appeals upheld the district court's dismissal of the counterclaim (J.S. App. 30a-31a), and the state has not sought this Court's review of that ruling.

The court of appeals affirmed (J.S. App. 18a-32a). That court agreed (*id.* at 26a-27a) that neither 16 U.S.C. 715f nor 16 U.S.C. 715k-5 requires the United States to obtain state or gubernatorial consent to acquisitions of waterfowl production areas in North Dakota. In the alternative, the court held (J.S. App. 27a-29a) that even if gubernatorial consent were required, it had been granted and could not be revoked. Finally, the court of appeals agreed with the district court (*id.* at 29a-30a) that the 1977 legislation enacted by North Dakota is impermissible to the extent that it encumbers federal law providing for the acquisition of waterfowl habitat.

ARGUMENT

Although the court of appeals may have erred in concluding that gubernatorial consent is not a prerequisite to the United States' acquisition of land within a state for use as a waterfowl production area, the result reached by the courts below nevertheless is correct because, as the court of appeals held in the alternative, the consent of the Governor of North Dakota was obtained in this case (J.S. App. 27a, 29a) and it has not been revoked.[4] That result creates no conflict with any decision of this Court or any other court of appeals and presents no substantial federal question requiring further review by this Court.

1. Without disputing that at one time the United States obtained gubernatorial consent to its acquisition of land located in North Dakota for use as waterfowl production

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[4]The parties to this action agree that 16 U.S.C. 715f's requirement of state consent to United States' acquisitions under the MBCA has no application to the government's acquisition of waterfowl production areas under the Duck Stamp Act, 16 U.S.C. 718d(c). Nor does the United States contend that North Dakota's consent to federal acquisitions under the MBCA, given in 1931 (see page 3, *supra*), would satify 16 U.S.C. 715k-5's requirement of gubernatorial consent to acquisitions made with moneys from the Migratory Bird Conservation Fund.

areas, the state contends (J.S. 13-14) that it may revoke such consent with respect to any lands that the United States has not yet acquired. The position of the United States, on the other hand, is that it has obtained gubernatorial consent to acquire land located in North Dakota and, having done so, that consent may not be revoked and the United States may exercise its right to negotiate for purchase or rent of such land at any time. Both courts below correctly adopted the view urged by the United States.

While Congress may elect to condition the performance of a federal function within a state upon that state's consent, such limitations are not favored and they will be strictly construed. See *Hancock* v. *Train*, 426 U.S. 167, 179 (1976). The statute relied on by the state, 16 U.S.C. 715k-5, which directs that "[n]o land shall be acquired with money from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency," makes no provision for revocation of such approval, once given. Moreover, as the court of appeals pointed out (J.S. App. 27a), "[t]o permit revocation would inject intolerable uncertainty into conservation planning and policy. It would subject every acquisition to the whim of changing state governments." Accordingly, the only other court of appeals to consider this issue also held that the governor of a state may not revoke his previously-given consent. *Swan Lake Hunting Club* v. *United States*, 381 F. 2d 238, 244-245 (5th Cir. 1967).

In any event, although the court of appeals did not reach this issue, no such revocation has been attempted here. Appellant can point to nothing more than the following statement by Governor Link (J.S. 9; footnote omitted): " 'I will not approve further wetland acquisitions by the Fish and Wildlife Service, pursuant to 16 U.S.C. § 715k-5, until all mitigation and enhancement lands are acquired for the Garrison Diversion Unit.' " The issue here, however, is

not whether the Governor *now* will consent to further acquisitions, but, rather, whether he has revoked the gubernatorial consents that were previously given with respect to lands that the United States has not yet acquired.

2. The court of appeals also correctly held (J.S. App. 30a) that, "[t]o the extent they encumber the federal statutes which provide for the acquisition of waterfowl habitat, [the statutes enacted by North Dakota in 1977] are impermissible and must yield to the overriding national interest in protecting migratory birds."

As noted above (at page 5, *supra*), the United States already has obtained gubernatorial consent to its acquisition of sufficient acreage in North Dakota to satisfy its acquisition objectives in that state. Accordingly, we are concerned here only with the effect of the 1977 North Dakota legislation on previously approved, but not yet consummated, federal acquisitions. Since, in such cases, the United States already has satisfied the only federal prerequisite, the effect of applying the 1977 legislation here would be to make the acquisition and maintenance of waterfowl production areas by the United States more burdensome and, hence, presumably less attractive to it—in conflict with the federal statutory policy in favor of the government's acquisition of lands for use as waterfowl habitats.[5] Because,

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[5]For example, although the United States has federal statutory authority and gubernatorial consent to negotiate for the purchase of any easement within a specified acreage, N.D. Cent. Code § 47-05-02.1.2 (1978) precludes it from obtaining an easement for a duration of more than 99 years, even if a vendor were willing to grant an easement in perpetuity. Similarly, although the United States already has obtained any federally required gubernatorial consent, N.D. Cent. Code § 20.1-02-18.1 (1978) would require it to obtain a second consent, in accordance with the procedures mandated by that section (see pages 5-6, *supra*).

On the other hand, in our view, N.D. Cent. Code § 20.1-02-18.2.1 (1978), as amended (see note 2, *supra*), which merely permits a land-

under the Supremacy Clause of the Constitution, Article VI, Clause 2, state laws that frustrate the full objectives of Congress cannot stand (see, *e.g.*, *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 240 (1967)), the 1977 legislation must give way with respect to acquisitions that previously have received gubernatorial consent. Cf. *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973).[6]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

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owner to "[n]egotiate the time period of the lease, easement, or servitude being sought," does not conflict with federal statutory law or policy and therfore is applicable to acquisitions that already have been approved, since it affords the landowner no rights that he would not have had in the absence of such legislation.

[6]Contrary to appellant's assertion (J.S. 14 n.35), the challenged North Dakota statutes have retroactive effect at least insofar as they are applied to United States' acquisitions that already have been approved by the requisite state authority.

Appellant's Reply Brief

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No. 81-773

In The

Supreme Court of the United States

October Term, 1981

STATE OF NORTH DAKOTA, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OPPOSING MOTION TO AFFIRM

ROBERT O. WEFALD
Attorney General
State of North Dakota

MURRAY G. SAGSVEEN
Counsel of Record
Special Assistant Attorney General
Zuger & Bucklin
P.O. Box 1695
Bismarck, ND 58502
701-223-2711
Counsel for Appellant

January 25, 1982

In The

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OPPOSING MOTION TO AFFIRM

I. Gubernatorial Consent

The United States, in its Motion to Affirm, admits that "the court of appeals may have erred" (i.e., that gubernatorial consent may indeed be a prerequisite to the United States' acquisition of land within a state as a waterfowl production area), yet the United States urges that the decision of the court of appeals be affirmed. We must disagree because the results would be manifestly unjust.

If this Court determines that gubernatorial consent is indeed a prerequisite, the court of appeals must be reversed on this issue for two fundamental reasons:

1. It would be harmful to federal-state relations to affirm the court of appeals' erroneous decision. The United States would use the erroneous decision as justifi-

cation for declining to secure any further gubernatorial consents in any state. This would, of course, include North Dakota; the United States would assert that it could, with impunity, exceed the acreage limitations in previous gubernatorial consents.

2. The court of appeals incorrectly assumed that previous gubernatorial consents were "sufficient to enable the Fish and Wildlife Service to meet its acquisition objectives for waterfowl production areas in North Dakota." J.S. App. 23a. However, the facts in the record cannot support the assumption. The Fish and Wildlife Service Director admitted that the United States has acquired 4.8 million easement acres in North Dakota for waterfowl production areas (which is millions of acres in excess of the acreage authorized by the governors) but the record does not reflect the actual acreage of waterfowl production area easement wetlands which the United States now claims to control. This issue was not addressed in the summary judgment proceedings before the trial court; accordingly, if gubernatorial revocation is not authorized, the action must be remanded to determine how many wetland acres have actually been acquired under the previous gubernatorial consents.

The State of North Dakota, therefore, suggests that summary reversal would be appropriate on this issue.

II. The Challenged State Laws

The court of appeals summarily declared that the 1977 North Dakota laws were unconstitutional: "To the extent they encumber the federal statutes which provide for the acquisition of waterfowl habitat, the challenged North Dakota statutes are impermissible and must yield to the overriding national interest in protecting migratory

birds". J.S. App. 30a. The sweeping invalidation of North Dakota laws is appalling to the State and even disturbs the United States. The Motion to Affirm cites a troubling example; one statute was declared unconstitutional even though the United States observes that "in our view, N.D. Cent. Code §20.1-02-18.2 . . . does not conflict with federal statutory law or policy." Motion to Affirm, p. 10-11, fn. 5.

The court of appeals' indiscriminate invalidation of the challenged North Dakota laws upsets a longstanding delicate federal-state arrangement concerning the acquisition of land for migratory waterfowl. Accordingly, the State of North Dakota suggests that a plenary review of this issue is essential.

ROBERT O. WEFALD
ATTORNEY GENERAL
STATE OF NORTH DAKOTA

Murray G. Sagsveen
Special Assistant Attorney General
Zuger & Bucklin
P.O. Box 1695
Bismarck, ND 58502

January 25, 1982

Appellant's Reply Brief

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No. 81-773

IN THE

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OCTOBER TERM, 1981

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BRIEF FOR THE STATE OF NORTH DAKOTA

ROBERT O. WEFALD
Attorney General
MURRAY G. SAGSVEEN
Special Assistant Attorney General
ZUGER & BUCKLIN
P.O. Box 1695
Bismarck, ND 58502
(701) 223-2711

OF COUNSEL:
DAVID E. ENGDAHL
University of Puget Sound
School of Law
950 Broadway Plaza
Tacoma, WA 98402
(206) 756-3485

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1. When federal law prohibits the acquisition of any land with moneys from the Migratory Bird Conservation Fund without State approval, can a state constitutionally deny, revoke, qualify, or condition such approval.

2. Does the federal law prohibiting the acquisition of any land with moneys from the Migratory Bird Conservation Fund without state approval apply to the acquisition of waterfowl production areas (fee and easement) with such moneys.

INDEX

	Page
Questions Presented	i
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	3
I. Proceedings in the Courts Below	3
II. Relevant Legal and Factual Background	4
Summary of Argument	9
Argument	10
I. Federal Law Prohibits the Acquisition of Waterfowl Production Areas with Moneys From the Migratory Bird Conservation Fund Unless a State's Governor Has Consented to the Specific Acquisition	10
A. The Requirement for Specific Gubernatorial Consent	10
1. The Court of Appeals' Codification Error: The Gubernatorial Consent Requirement is Not a Part of the Migratory Bird Conservation Act	10
2. Legislative History	13
3. Deference Should be Given to the Longstanding Administrative Construction of the Gubernatorial Consent Requirement	14

4. Other Interpretation Errors by the Court of Appeals 17

B. "Specific" Consent Was Never Given .. 19

C. Previous Gubernatorial Consents Do Not Authorize Any Further Acquisitions 20

II. The Gubernatorial Consent Required for the Acquisition of Waterfowl Production Areas May be Prospectively Withdrawn 22

A. The Power To Revoke 22

B. The Reasons for Revocation 27

1. Incorporation of Waterfowl Production Areas Into the National Wildlife Refuge System 28

2. Misrepresentation by Federal Acquisition Personnel 30

3. The Starkweather Watershed Project 31

4. Controversies Concerning the Garrison Diversion Unit 32

III. The Challenged State Statutes Are Permissible Conditions or Qualifications to State Consent 33

A. Section 47-05-02.1 of the North Dakota Century Code, which limits all easements in North Dakota to 99 years and requires that all easements "be properly described," is a proper exercise of state power. 37

B. Section 20.1-02-18.1 of the North Dakota Century Code, which established procedures for public participation in the decision-making process concerning fee and easement acquisitions by the United States, is a proper exercise of state power. 39

C. Section 20.1-02-18.2 of the North Dakota Century Code, which places certain limitations upon easements acquired by the United States with moneys from the Migratory Bird Conservation Fund, is a proper exercise of state power. 40

D. Section 20.1-02-18.3 of the North Dakota Century Code, which suspended legislative consent to federal acquisitions for migratory bird reservations under the migratory bird conservation act, is a proper exercise of state power..... 41

IV. Conclusion 42

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Cases

Beers v. Arkansas, 61 U.S. (20 How.) 527 (1858)..... 24,34

Board of Directors, Garrison Diversion Conservancy District v. Andrus, No. A2-80-22 (D.N.D. March 18, 1981) 32

Board of Governors v. First Lincolnwood Corp., 439 U.S. 234, 248 (1978) 15

Caminetti v. United States, 242 U.S. 470, 485 (1917) ... 18

Consumer Product Safety Commission v. GTE Sylvania, Inc., ____ U.S. ____, 100 S. Ct. 2051, 2056 (1980) . . 18

Des Moines National Bank v. Fairweather, 263 U.S. 103, 106 (1923) 34

Ex parte Bakelite Corporation, 279 U.S. 438, 452 (1929) 34

FAA Administrator v. Robertson, 422 U.S. 255, 266 (1975) 18

First National Bank v. Anderson, 269 U.S. 341, 347 (1926) 34

Gravitt v. United States, 523 U.S. 1211, 1217 n.9 (5th Cir. 1975) 23

Great Northern Ins. Co. v. Read, 322 U.S. 47, 54-55 (1944) 34

Hodel v. Indiana, ____ U.S. ____, 69 L.Ed.2d 40, 56 (1981) 24

James v. Dravo Contracting Co., 302 U.S. 134, 146-149 (1937) 34

Kennerly v. District Court, 400 U.S. 423 (1971) 35

Kokoszka v. Belford, 417 U.S. 642, 650 (1974) 13

Lehman v. Nakshian, ____ U.S. ____, ____, 69 L.Ed.2d 548, 553 (1981) 34

Lynch v. United States, 292 U.S. 571, 581-582 (1934) . . . 24

Maricopa County v. Valley Bank, 318 U.S. 357, 362 (1943) 24

Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977) 23

McLaren v. Fleischer, 256 U.S. 477 (1921) 17

Morton v. Mancari, 417 U.S. 535, 551 (1974) 18

Nashville Milk Co. v. Carnation Co., 355 U.S. 373, reh den 355 U.S. 967 (1958) 12

National Audubon Society, Inc. v. Andrus, ____ F. Supp. ____, No. 76-0943, (D.C.C. May 6, 1981) .. 8

National League of Cities v. Usery, 426 U.S. 833 (1976). 23

National Wildlife Federation v. Alexander, 613 F.2d 1054 (D.C. Cir. 1979) 31

Palmer v. Massachusetts, 308 U.S. 79, 83-84 (1939) 18

Parden v. Terminal Railway, 377 U.S. 184, 192-193 (1964) 35

Paul v. United States, 371 U.S. 245, 265 (1963) 34

Petty v. Tennessee-Missouri Bridge Comm'n., 359 U.S. 275 (1959) 35

Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) 13

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969) 15

Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963) 36

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)..... 23

Schwartz v. Texas, 344 U.S. 199, 202-203 (1952) 36

Sierra Club v. Hickel, 467 F.2d 1048, 1051 (6th Cir. 1972) 11

Soriano v. United States, 352 U.S. 270, 276 (1956) 34

State Land Board v. Corvallis Sand and Gravel Co., 429 U.S. 363, 378 (1977) 39

Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967) 19,27,40

Towner County Water Resource District v. Key, No. A2-81-178 (D.N.C.) 29

Udall v. Tallman, 380 U.S. 1, 16 (1965) 15

United States v. Albrecht, 496 F.2d 906, 909-910 (8th Cir. 1974) 29

United States v. Bily, 406 F. Supp. 726 (E.D. Pa. 1975) . 23

United States v. Burnison, 339 U.S. 87 (1950) 39

United States v. Esnault-Pelterie, 303 U.S. 26, 28 (1938) 34

United States v. Felt & Tarrant Co., 283 U.S. 269, 273 (1931) 34

United States v. Miner, 484 F.2d 1075 (9th Cir. 1973)... 23

United States v. Sherwood, 312 U.S. 584, 586-587 (1941) 34

United States v. Tax Commission of Mississippi, 412 U.S. 363, 372 n. 16 (1973) 34

United States v. Welden, 377 U.S. 95, 98-99 at f.n. 4 (1964) 12

United States of America v. Seest, 631 F.2d 107 (8th Cir. 1980) 29

United States of America v. Welte, No. C2-81-49 (D.N.D. March 1, 1982)..... 21,29

Virgil v. Time, Inc., 527 F.2d 1122, 1127 (9th Cir. 1975) 24

Washington v. Yakima Indian Nation, 439 U.S. 463, 493-499 (1979) 35

Werner v. U.S. Dept. of Interior, Fish and Wildlife, 581 F.2d 169-170 (8th Cir. 1978) 30

West v. Standard Oil Co., 278 U.S. 200 (1929) 26

Wilbur v. United States ex . l Kadrie, 281 U.S. 206 (1930) 25

Zemel v. Rusk, 381 U.S. 1, 11-12 (196. 15

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978) 17

Constitution and Statutes:

United States Constitution:

Article VI. Cl. 2 2

Act of February 13, 1929, 45 Stat. 1222; 16 U.S.C. §715 et seq. ..... passim

Act of March 16, 1934, 48 Stat. 451; 16 U.S.C. §718 et seq. ..... passim

Act of August 1, 1958; 72 Stat. 486; 16 U.S.C. §718d(c) . passim

Act of October 4, 1961; Pub. L. 87-383; 75 Stat. 813; 16 U.S.C. §715k-5 ..... passim

Act of August 30, 1964; Pub. L. 88-523; 78 Stat. 701; 16 U.S.C. §715s 6

Act of October 15, 1966; Pub. L. 89-669; 80 Stat. 926, 927; 16 U.S.C. §668dd 7

Pub. L. 89-108; 79 Stat. 433 32

45 Stat. 1223; 16 U.S.C. §715f 4

48 Stat. 451; 16 U.S.C. §718d 4

50 CFR §25.12 29

50 CFR Part 26 29

74 Cong. Rec. 17111 (May 28, 1961) 19,20

107 Cong. Rec. 12203 (1961) 5

107 Cong. Rec. 12205 (1961) 13

107 Cong. Rec. 17171 (1961) 13

107 Cong. Rec. 17172 (1961) 13

113 Cong. Rec. 16222, 16224 and 33340 (1967) 16

124 Cong. Rec. H10654-H10657 and H12846-H12847 (1978) 17

124 Cong. Rec. S17673 (1978) 17

H.R. 11525, 87th Cong. 2d Sess. (1962) 15

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H.R. 13372, 95th Cong. 2d Sess. (1978) 16

H.R. Rep. No. 95-1518, 95th Cong., 2d Sess. 13, reprinted in 1978 U.S. Code Cong. & Ad. News 4722, 4734 .. 16

H. Rept. No. 1184, 107 Cong. Rec. 21184 (1961) 14

Proposed Amendments to Authorize Increased Payments to Counties for Wildlife Refuges: Hearings on H.R. 10714, H.R. 11525, H.R. 11535, H.R. 12143, H.R. 12144 and H.R. 12145 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 88th Cong., 2d Sess. 21 and 87-87 (1962) 15

Hearing Before the Committee on Commerce, 88th Congress, Second Session, February 21, 1964 40

Hearings Before the Subcommittee on Fisheries and Wildlife Conservation, Eighty-Seventh Congress, Second Session, July 11 and 12, 1962. 39

"A Framework for Preemption Analysis", 88 Yale L.J. 363, at 389 (1978) 37

North Dakota Century Code Section 20.1-02-18 39

North Dakota Century Code Section 20.1-02-18.1 39

North Dakota Century Code Section 20.1-02-18.2 40

North Dakota Century Code Section 20.1-02-18.3 41

North Dakota Century Code Section 47-05-02.1 37

Chapter 207, 1931 N.D. Session Laws 4

Senate Concurrent Resolution 4048, 1975 N.D. Session Laws 8

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On Appeal from the United States Court
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BRIEF FOR THE STATE OF NORTH DAKOTA

OPINIONS BELOW

The opinion of the Court of Appeals (J.S. App. 18a-32a) is reported at 650 F.2d 911. The opinion of the district court (J.S. App. 8a-13a) is not reported.

JURISDICTION

The judgment of the United States District Court was entered on July 14, 1980. The United States District Court declared (1) that North Dakota Century Code Sections 20.1-02-18, 20.1-02-18.1, 20.1-02-18.2 and 47-05-02.1 unconstitutionally interfered with federal land acquisitions in North Dakota; and (2) that the Governor's consent is not required for federal acquisition of waterfowl production areas notwithstanding the consent requirement of 16 U.S.C. §715k-5 (J.S. App. 8a-17a).

The State of North Dakota appealed to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court in a decision entered June 3, 1981 (J.S. App. 18a-32a). The State of North Dakota petitioned for a rehearing; the petition was denied on July 21, 1981 (J.S. App. 32a).

The Notice of Appeal was timely filed with the United States Court of Appeals for the Eighth Circuit on September 21, 1981 (J.S. App. 33a-34a).

This appeal was docketed in this Court within 90 days from the denial of rehearing by the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

Probable jurisdiction was noted by the Supreme Court of the United States on March 1, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This appeal involves the following constitutional article and laws:

1. U.S. Constitution, Art. VI, Cl. 2
2. Migratory Bird Conservation Act of 1929, 16 U.S.C. §715 *et. seq.*
3. Migratory Bird Hunting Stamp Act of 1934, 16 U.S.C. §718 *et. seq.*
4. National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §668dd
5. Wetlands Loan Act of 1961, 16 U.S.C. §715k-5
6. North Dakota Century Code Sections 20.1-02-18, 20.1-02-18.1, 20.1-02-18.2, 20.1-02-18.3, and 47-05-02.1

The relevant provisions of the constitutional article and laws are set forth in the Joint Appendix or Jurisdictional Statement.

STATEMENT OF THE CASE

I. Proceedings in the Courts Below

The Migratory Bird Conservation Act of 1929 and the Wetlands Loan Act of 1961 established a federal-state cooperative program for the federal acquisition of land for "refuges" or "inviolate sanctuaries" and "waterfowl production areas". Millions of fee and easement acres have been acquired in North Dakota by the Secretary of the Interior under these programs.

Disputes concerning such acquisitions have, however, arisen within recent years. The disputes led to state laws which, among other things, established formal procedures for public participation in the acquisition process. The Secretary of the Interior considered the state laws to be objectionable. Six weeks after the state laws became effective, the Secretary created the fact situation for a test case to challenge the state laws; his representatives negotiated, in a manner contrary to the state laws, a contract for the "Conveyance of Easement for Waterfowl Management Rights" with a North Dakota landowner. The United States Attorney General then informally advised the Secretary that the state laws would prevent the conveyance.

The United States responded in May 1979 with a lawsuit challenging the constitutionality of the state laws (R.1). The state moved to dismiss (R.5), but the motion was denied in February 1980 (R.15). Both parties moved for summary judgment (R.13 and R.26) by March 1980.

After a hearing (R.27) on the cross-motions, the District Court declared, inter alia, that the challenged state laws were unconstitutional (J.S. App. 80-13a; R.31). A subsequent motion for relief was denied, but a motion for stay pending appeal was granted (J.S. App. 14a-15a; R.35). Judgment was entered in July 1980 (J.S. App. 16a-17a; R.36). The Court of Appeals for the Eighth Circuit affirmed the District Court in

June 1981 (J.S. App. 18a-32a). A petition for rehearing was denied the following month (J.S. App. 32a). The Court of Appeals summarily declared that the North Dakota laws "are clearly hostile to the acquisition of waterfowl production areas by the United States" and "that waterfowl production areas may be acquired without state or gubernatorial consent" (J.S. App. 28a-30a).

The State of North Dakota filed a timely appeal to the United States Supreme Court in September 1981.

II. Relevant Legal and Factual Background

The 1929 Migratory Bird Conservation Act[1] authorizes the acquisition of land for inviolate migratory bird sanctuaries (refuges). Section 7 of the Act contains an unusual requirement: the federal government may not acquire land unless a state consents "by law".[2] The State of North Dakota gave its consent in 1931.[3]

The 1934 Migratory Bird Hunting Stamp Act[4] soon provided a funding mechanism for the refuge acquisition program. Migratory bird hunting and conservation stamps (duck stamps) were sold to generate revenue for the newly created Migratory Bird Conservation Fund.[5]

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[1] Act of February 18, 1929, 45 Stat. 1222; 16 U.S.C. §715 *et seq.* Contrary to the suggestion made by the Court of Appeals (J.S. 19a), this case does not concern any treaty obligations of the United States. The 1916 treaty (39 Stat. 1702) and the 1918 Migratory Bird Treaty Act (40 Stat. 755) neither authorize nor require the acquisition or maintenance of wetlands for waterfowl production areas.

[2] 45 Stat. 1223; 16 U.S.C. §715f.

[3] Ch. 207, 1931 North Dakota Session Laws.

[4] Act of March 16, 1934; 48 Stat. 451; 16 U.S.C. §718 *et. seq.*

[5] 48 Stat. 451; 16 U.S.C. §718d.

The Secretary of the Interior was given flexibility to acquire lands or interests in lands for "waterfowl production areas" in a 1958 amendment to the Migratory Bird Hunting Stamp Act.[6] Unlike lands acquired under the Migratory Bird Conservation Act, waterfowl production areas are not "inviolate sanctuaries". The amendment also provided that the Secretary of the Interior could acquire such waterfowl production areas without the state legislative consent contemplated in the 1929 Act.

Congress was soon informed that a "crash program"[7] for the acquisition of waterfowl production areas was desirable but that normal revenues to the Migratory Bird Conservation Fund could not finance a massive land acquisition program. Congress, accordingly, determined in 1961 that a $105 million interest-free loan to the Fund was necessary. Congress, however, also recognized that the tradition of state involvement should be extended to all acquisitions involving moneys from the Migratory Bird Conservation Fund whether for "inviolate sanctuaries" or "waterfowl production areas". The legislation, as finally enacted, stated:

> no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency.[8]

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[6] Act of August 1, 1958; 72 Stat. 486, 487; 16 U.S.C. §718d(c)

[7] 107 Cong. Rec. 12203 (1961) (Congressman Johnson).

[8] Act of October 4, 1961; Pub. L. 87-383; 75 Stat. 813; 16 U.S.C. §715k-5.

Whereas the state consent contemplated by the 1929 Migratory Bird Conservation Act was legislative, the 1961 Act required approval by the state governor or the appropriate state agency. Both consents are required for the acquisition of inviolate sanctuaries under the Migratory Bird Conservation Act, but state legislative consent is not necessary for the acquisition of waterfowl production areas.

The Governor of North Dakota, William L. Guy, was immediately contacted in 1961 concerning the federal plans for acquisition of waterfowl production areas in North Dakota. At the request of officials of the United States Fish and Wildlife Service (FWS), Department of the Interior, Governor Guy approved the acquisition of about 1.2 million acres of easements in North Dakota for waterfowl production area purposes.[9]

The waterfowl production area acquisition program encountered one problem immediately: acquisition of fee waterfowl production areas by the FWS caused financial problems for the affected political subdivision. Governor Guy, therefore, announced that he would not approve the acquisition of fee waterfowl production areas until suitable legislation was enacted to make payments to affected political subdivisions for the diminished tax base. Governor Guy's efforts were partially responsible for the passage of ameliorating legislation in 1964 to make a more equitable distribution of revenues derived from lands of the National Wildlife Refuge System.[10]

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[9] J.A. 3-5 Governor Guy had reserved the right to individually review each proposed fee acquisition of a waterfowl production area (J.A. 54, ¶3).

[10] Act of August 30, 1964; Pub. L. 88-523; 78 Stat. 701; 16 U.S.C. §715s. The 1964 legislation made waterfowl production areas a part of the National Wildlife Refuge System. The National Wildlife Refuge System was redefined in the "National Wildlife Refuge System Administration Act of 1966":

> For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the

Notwithstanding the initial problems, the federal-state program for the acquisition of waterfowl production areas was successful for many years. The federal government acquired interests in 5.3 million acres (about 8,300 square miles) of land in North Dakota for the benefit of migratory waterfowl, and most of the acquisitions have been within the past twenty years.[11]

Serious opposition to the federal acquisition of waterfowl production areas in North Dakota, however, developed in re-

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> Secretary of the Interior for the conservation of fish and wildlife, including species that are threatened with extinction, *all lands, waters, and interests therein* administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or *waterfowl production areas are hereby designated as the "National Wildlife Refuge System"* (referred to herein as the "System") which shall be subject to the provisions of this section . . . [Emphasis added]

Act of October 15, 1966; Pub. L. 89-669; 80 Stat. 926, 927; 16 U.S.C. §668dd. The short title was provided in §12(f) of the Act of December 5, 1969. Inclusion of waterfowl production areas in the National Wildlife Refuge System had a profound impact on the acquisition programs.

[11] This acreage includes 418,570 acres owned in fee for National Wildlife Refuges and Waterfowl Production Areas and 4,855,851 acres of privately owned land over which the United States has easement interests for waterfowl production areas. Easements covering 4,788,830 acres have been acquired since passage of the 1958 authorization. See p. 21, *infra,* and J.A. 48-50.

cent years.[12] The federal-state disputes led to a legislative[13] and gubernatorial review of the state policy concerning federal land acquisitions in North Dakota. The challenged state laws and the gubernatorial review resulted in a decision by Governor Link to disapprove further wetland acquisitions.[14]

The Court of Appeals ultimately invalidated the state statutes; held that gubernatorial approval to acquisition of waterfowl production areas was unnecessary; and declared that, even if necessary, such consent having once been given could not be revoked.

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[12] Several examples (to be discussed later in greater detail) illustrate the reasons for the opposition:

> 1) Misrepresentations were made to landowners by federal acquisition personnel to induce the conveyance of easements to the United States.
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> 2) The Department of the Interior refused to honor agreements made with the state concerning the Starkweather Watershed Project and the Garrison Diversion Unit.
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> 3) The United States resorted to criminal prosecutions, rather than civil actions, for alleged violations of the easement agreements.

[13] Senate Concurrent Resolution 4048, 1975 North Dakota Session Laws.

[14] The Governor and the Secretary could not agree on modificactions to the fish and wildlife mitigation plan for the Garrison Diversion Unit, a Bureau of Reclamation project which the Secretary had placed on the "hit list" in 1977. Although the Garrison Diversion Unit was authorized by the Flood Control Act of 1944 (58 Stat. 887) and "confirmed and approved" in 1965 (79 Stat. 433), it was administratively deauthorized by Secretary Andrus in 1977. *National Audubon Society, Inc.*, v. *Andrus*, No. 76-0943 (D.D.C. May 6, 1981). The dispute led to an unequivocal policy statement by Governor Link in 1979:

> I will not approve any further wetlands acquisitions by the Fish and Wildlife Service, pursuant to 16 U.S.C. §715k-5, until all mitigation and enhancement lands are acquired for the Garrison Diversion Unit. [J.S. 25 and 45, ¶23]

SUMMARY OF ARGUMENT

1. The Wetlands Loan Act of 1961, as amended, provides that "no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency". However, the Court of Appeals declared "that waterfowl production areas may be acquired without state or gubernatorial consent" even though acquired with moneys from the Migratory Bird Conservation Fund. In response the State of North Dakota contends that (a) gubernatorial consent is indeed required for the acquisition of waterfowl production areas with moneys from the Migratory Bird Conservation Fund; and (b) sufficient gubernatorial consent for further waterfowl production area acquisitions in North Dakota does not exist.

2. When moneys from the Migratory Bird Conservation Fund are used, state legislative and gubernatorial consents are required for the federal acquisition of inviolate sanctuaries and gubernatorial consent is required for the federal acquisition of waterfowl production areas. Both consents can prospectively be withdrawn.

3. The State of North Dakota has enacted laws which qualify state consent to acquisition of inviolate sanctuaries and waterfowl production areas. Instead of being void as preempted, these laws are permissible exercises of the power which the states have, under federal law, to grant or deny state consent.

ARGUMENT

I.

Federal Law Prohibits The Acquisition Of Waterfowl Production Areas With Moneys From The Migratory Bird Conservation Fund Unless A State's Governor Has Consented To The Specific Acquisition

A. The Requirement For Specific Gubernatorial Consent

Federal law mandates that "no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency".[15]

The Court of Appeals, however, erroneously concluded that the Secretary of the Interior may acquire fee or easement interests in land for waterfowl production areas "with moneys from the migratory bird conservation fund" *without* approval by the governor of North Dakota.

Although the United States apparently concurs[16] with the State of North Dakota, the United States has not conceded the issue. Therefore, the primary errors of statutory interpretation by the Court of Appeals will be addressed seriatim.

1. The Court of Appeals' Codification Error: The Gubernatorial Consent Requirement is not a Part of the Migratory Bird Conservation Act.

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[15] 16 U.S.C. §715k-5.

[16] The United States declared, at page 8 of its Motion to Affirm, that

> the court of appeals may have erred in concluding that gubernatorial consent is not a prerequisite to the United States' acquisition of land within a state for use as a waterfowl production area . . .

The Court of Appeals wrongly assumed that the gubernatorial consent provision is a part of the Migratory Bird Conservation Act.

The 1929 Migratory Bird Conservation Act, which authorized the acquisition of inviolate bird sanctuaries, contained only one reference to state consent. Section 7 (now codified as 16 U.S.C. §715f) stated: "no deed or instrument of conveyance shall be accepted by the Secretary . . . under this Act unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State."

The gubernatorial consent requirement was subsequently enacted in the Wetlands Loan Act of 1961, an independent law designed to finance a crash wetland acquisition program.[17]

Under guidelnes established by this Court, the gubernatorial consent requirement contained in the 1961 Act (even though codified 16 U.S.C. §715k-5) cannot be considered an amendment or supplement to the 1929 Migratory Bird Conservation Act (16 U.S.C. §715 et. seq.) merely because "§715k-5" was, by a quirk of fate, assigned in the codification process.[18]

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[17] J.A. 83-84.

[18] In this case, it appears that even the codifiers of the United States Code did not consider the 1961 Act (Pub. L. 87-383) to be part of the Migratory Bird Conservation Act. The 1976 edition contains a comment following 16 U.S.C. §715k-5 which states: "Section was not enacted as part of the 'Migratory Bird Conservation Act' which comprises this subchapter". An explanatory note to 16 U.S.C.S. §715k-5 (1978 edition) states: "This section was not enacted as part of the 'Migratory Bird Conservation Act' which comprises this subchapter." The text of 16 U.S.C.A. §715 states: "Sections 715 to 715d, 715e, 715f to 715k and 715l to 715r of this title shall be known by the short title of 'Migratory Bird Conservation Act'." See, *Sierra Club* v. *Hickel*, 467 F.2d 1048, 1051 (6th Cir. 1972). Even the plaintiffs did not consider §715k-5 to be a part of the Migratory Bird Conservation Act (see paragraph 3 of the compiaint, (J.A. 30).

In *Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, reh den 355 U.S. 967 (1958) the Supreme Court considered a similar question involving the antitrust laws. The single issue before the Court was whether Congress had made Section 3 of the Robinson-Patman Act a part of the Clayton Act, thereby making Section 3 one of the "antitrust laws".

The Clayton Act permitted private actions for injuries resulting from practices forbidden by the Act (and certain other "antitrust laws"). The subsequent Robinson-Patman Act, consisting of four sections, contained two sections which were the subject of the controversy. Section one of the Robinson-Patman Act expressly amended section two of the Clayton Act. However, section 3 of the Robinson-Patman Act did not on its face amend the Clayton Act, *yet* the codifiers of the 1940, 1946 and 1952 codes treated section 3 of the Robinson-Patman Act as part of the Clayton Act (see f.n. 8, 355 U.S. at 379). The Court declared that the fair conclusion to be drawn is "that §3 of the Robinson-Patman Act was not intended to become part of the Clayton Act." 355 U.S. at 380.

The guidelines contained in the *Nashville Milk* decision were reinforced several years later when the Supreme Court observed that an "arrangement" made by a codifier without the approval of Congress should be given no weight. Specificaliy, "in order to construe [a statute], we must read it in the context of the entire Act, rather than in the context of the 'arrangement' selected by the codifier." *United States* v. *Weiden*, 377 U.S. 95, 98-99 at f.n. 4 (1964).

Applying the same principle here means that the gubernatorial consent provision of the 1961 Wetlands Loan Act cannot be regarded as a part of the 1929 Migratory Bird Conservation Act merely because the codifiers designated it as 16 U.S.C. §715k-5. Therefore, it was error for the Court of Appeals to conclude that the gubernatorial consent requirement is made inapplicable to waterfowl production area acquisitions by the language of 16 U.S.C. §718d(c).

2. Legislative History

Legislative history clearly indicates that the gubernatorial consent provision was to govern the acquisition of waterfowl production areas. This legislative history of the gubernatorial consent provision should have been considered by the Court of Appeals.[19]

The law originated in the House. During debate, Congressman Short of North Dakota expressed concern that indiscriminate acquisitions by the Fish and Wildlife Service impact political subdivisions: "This has happened time and time again in North Dakota, and it has had an extremely adverse effect on many of our local political subdivisions . . . there are practical aspects that should be kept in mind." 107 Cong. Rec. 12205 (1961).

This general concern led to a Senate amendment: "*Provided further,* That no land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or the appropriate State agency." 107 Cong. Rec. 17172 (1961). The intent of the amendment was stated in the Senate and the House:

> We added an amendment to the bill . . . to provide that no lands should be purchased under the plan unless the Federal Government and the State involved had a complete agreement, either with the Governor or the State agency . . . *It is provided that they must be in complete agreement as to the nature of the lands and the acreage involved.* [107 Cong. Rec. 17171 (1961) (Senator Magnuson); Emphasis added].

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[19] *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975); *Kokoszka* v. *Belford,* 417 U.S. 642, 650 (1974).

> [T]he Senate bill provided that land acquisitions could be made in States only with the approval of the Governor or appropriate agencies of the States. [H. Rept. No. 1184, 107 Cong. Rec. 21184 (1961)]

3. Deference Should Be Given To The Longstanding Administrative Construction Of The Gubernatorial Consent Requirement

The United States has continuously recognized, since the passage of the Wetlands Loan Act of 1961, that gubernatorial consent is necessary for the acquisition of "waterfowl production areas" with moneys from the Migratory Bird Conservation Fund. Indeed, the law was enacted on October 4, 1961, and the United States sought and secured Governor Guy's approval for initial acquisitions as early as December 18, 1961.[20]

Unfortunately, the Court of Appeals ignored the general rule that, in construing a statute, deference should be shown to the

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[20] See J.A. 3-5 and R. 9). The United States continued to seek executive branch consent in Minnesota for proposed waterfowl production area acquisitions, even after the judgment of the Court of Appeals in this case. An August 12, 1981, letter from the United States Department of the Interior to the State of Minnesota states, in part:

> The U.S. Fish and Wildlife Service has obtained fee options on two tracts of land and easement options for waterfowl management rights on 12 tracts of land under and in compliance with the provisions of Section 4(c) of the Act of March 16, 1934 (48 Stat. 451), as amended. All of these tracts, both fee and easement, have been certified in writing for acquisition by the respective county commissioners—descriptions of these tracts are shown on the attached composite lists.
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> • • •
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> Pursuant to Minnesota Statute 1949, Section 1.041, and the requirement of the before-designated Act, consent of the State for the acquisitions by the United States is hereby requested.

prior administrative construction of the statute.[21] The Court of Appeals' error was particularly significant in this case because "an agency's long-standing construction of its statutory mandate is entitled to great respect, 'especially when Congress has refused to alter the administrative construction'. *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969); *Zemel* v. *Rusk,* 381 U.S. 1, 11-12 (1965); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965)." *Board of Governors* v. *First Lincolnwood Corp.,* 439 U.S. 234, 248 (1978).

Attempts were made as early as 1962 to frustrate the gubernatorial consent requirement. A bill[22] to adjust the apportionment to states of moneys available under the Federal Aid and Wildlife Restoration Act contained the following proviso:

> That no apportionment shall be made . . . to any State that has not fully approved the acquisition of all lands determined by the Secretary of the Interior to be needed for waterfowl conservation under the terms of the Wetlands Acquisition Act of 1961 (75 Stat. 813).

The hearings revealed that the bill sponsor was unhappy that a state's governor had a role in the federal acquisition programs.[23]

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[21] Annot., 39 L.Ed. 2d 942 (1975).

[22] H.R. 11525, 87th Cong. 2d Sess. (1962).

[23] Proposed Amendments to Authorize Increased Payments to Counties for Wildlife Refuges: Hearings on H.R. 10714, H.R. 11525, H.R. 11535, H.R. 12143, H.R. 12144 and H.R. 12145 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries, 88th Cong., 2d Sess. 21 and 86-87 (1962).

An attempt was also made in 1967 to remove the gubernatorial consent requirement. When a bill was introduced to extend the 1961 Wetlands Loan Act, opponents of gubernatorial consent argued that the 1964 refuge revenue sharing legislation had eliminated the need for gubernatorial consent.[24] Others, however, disagreed and the bill was amended in the Senate by insertion of the 1961 gubernatorial consent language.

The most recent attempt to remove the gubernatorial consent requirement was in 1978. The major effort was in a bill initially designed to prohibit the hunting of migratory waterfowl in a state in which the governor did not promptly approve proposed acquisitions.[25] The bill was amended in the House to repeal the state legislative consent requirement (16 U.S.C. §715f)[26] and to add a qualifier to the gubernatorial consent requirement: "except that such approval is not required when the transaction is a voluntary one between a willing seller and the Secretary of the Interior." 124 Cong. Rec. H10655 (1978).

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[24] 113 Cong. Rec. 16222, 16224 and 33340 (1967).

[25] H.R. 13372, 95th Cong. 2d Sess. (1978). The bill would have added a concluding sentence to the gubernatorial consent requirement of 16 U.S.C. §715k-5:

> The Secretary of the Interior shall prohibit the taking, killing, or possessing of any migratory bird in any State in which the Governor or the appropriate State agency fails within a reasonable period of time to approve a proposed acquisition of land with such moneys.

A companion bill would have simply repealed the gubernatorial consent requirement. H.R. 13371, 95th Cong., 2d Sess. (1978).

[26] This was based upon a recommendation from Assistant Secretary of the Interior Herbst to correct a "technical error". H.R. Rep. No. 95-1518, 95th Cong., 2d Sess. 13, *reprinted in* 1978 U.S. Code Cong. & Ad. News 4722, 4734.

The House approved the bill upon the recommendation of the Committee on Merchant Marine and Fisheries. The Committee mentioned one of the laws challenged in this appeal and expressed opposition to the gubernatorial consent provision.[27]

The Senate rejected the provision concerning gubernatorial consent, after debate critical of the continued tampering with the 1961 law, by a floor amendment to the bill (which was not referred to a committee).[28]

This Court recently said, concerning a similar situation, that "the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons'. *McLaren* v. *Fleischer,* 256 U.S. 477 (1921) . . .." *Zenith Radio Corp.* v. *United States,* 437 U.S. 443 (1978). No cogent reasons have ever been shown by the United States in this case.

4. Other Interpretation Errors By The Court Of Appeals

a. The Gubernatorial Consent Provision and the 1958 Authorization are Harmonious.

The requirement for gubernatorial consent is completely harmonious with 16 U.S.C. §§715f and 715d(c):

(i) If moneys from the Migratory Bird Conservation Fund are used to acquire "sanctuaries" or "refuges" under the authority of the Migratory Bird Conservation Act, the state's legislative consent (16 U.S.C. §715f) *and* the governor's consent (16 U.S.C. §715k-5) are required.

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[27] *Id.* p. 4728-4729. Debate in the House is at 124 Cong. Rec. H10654-H10657 and H12846-H12847 (1978).

[28] 124 Cong. Rec. S17673 (1978).

(ii) If moneys from the Migratory Bird Conservation Fund are used to acquire waterfowl production areas under the authority of 16 U.S.C. §718d(c), the state's legislative consent (16 U.S.C. §715f) is not required, but the governor's consent (16 U.S.C. §715k-5) *is still required.*

b. In the Event of a Conflict, the 1961 Law Prevails Over the 1958 Law.

If this Court determines that an ambiguity exists and that interpretation is required, the Court should uphold the clear[29] mandate of the last enacted (and reenacted)[30] statute—the 1961 gubernatorial consent requirement. It is a rule of construction that when statutes are in conflict, the one last enacted prevails as being the last expression of legislative intent. *FAA Administrator* v. *Robertson,* 422 U.S. 255, 266 (1975); *Morton* v. *Mancari,* 417 U.S. 535, 551 (1974).

c. The Court of Appeals did not Give Proper Consideration to the Federal-State Relationship

This Court has noted that caution should be exercised when a statute concerning state-federal relations is concerned. "Especially, is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government." *Palmer* v. *Massachusetts,* 308 U.S. 79, 83-84 (1939). No such

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[29] This Court has consistently accorded first priority in statutory interpretation to the plain meaning of the provision in question. *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917); *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.,* ____U.S.____, 100 S. Ct. 2051, 2056 (1980).

[30] The gubernatorial consent sentence was enacted in 1961 (Pub. L. 87-383), reenacted in 1967 (Pub. L. 90-205) and the first two words were modified in a 1976 amendment (Pub. L. 94-215).

caution was exercised by the Court of Appeals in this case.

B. "Specific" Consent Was Never Given

The legislative consent required for the acquisition of inviolate sanctuaries is generic in nature; 16 U.S.C. §715f does not require a separate approval for each acquired tract. In contrast, the gubernatorial consent that is required for any acquisitions with moneys from the Migratory Bird Conservation Fund, including waterfowl production areas and inviolate sanctuaries, is specific in nature. *Swan Lake Hunting Club* v. *United States*, 381 F.2d 238 (5th Cir. 1967) is the only judicial authority addressing the question of how "specific" the gubernatorial consent must be. The facts of that case involved a "sanctuary", not a "waterfowl production area". However, since the language in §715k-5 applies to *all* acquisitions with moneys from the Migratory Bird Conservation Fund, whether for "sanctuaries" or for "waterfowl production areas", the construction of that language by the Fifth Circuit in *Swan Lake* is equally applicable here.

The Fifth Circuit Court of Appeals said of 16 U.S.C. §715k-5:

> The congressional history of the 1961 proviso suggests that it does not contemplate action by the state legislatures (as did the original Act) but approval by either the governor or a state executive agency of acquisition of each specific tract. This was prior administrative practice, and the statutory provision was intended merely to formalize it. Senator Magnuson commented on the floor of the Senate:
>
> > "[W]e do this anyway, but thought we would make it more safe—to provide that no land should be purchased under the plan unless the Federal Government and the State involved had a complete agreement, either with the Governor or the State agency * * *. It

> is provided that they must be in complete agreement *as to the nature of the lands and the acreage involved.*" 74 Cong. Record 117111 (May 28, 1961). (Emphasis provided)
>
> It is clear, then, that land may not be acquired for purposes of the Migratory Bird Conservation Act with funds from the Migratory Bird Conservation Fund unless (a) the state in which the land is located has "consented by law to the acquisition by the United States of land in that State," and (b) *the governor or appropriate state agency has approved acquisition of the specific land sought to be acquired.* [Emphasis added] [381 F2d at 243]

"Generic" legislative consent, of course, is not necessary for "waterfowl production area" acquisitions; but *Swan Lake* recognizes that the separate "specific" gubernatorial consent must be given for "each specific tract" and "the specific land sought to be acquired." Further, as it was stated on the floor of the Senate, a governor and the FWS "must be in complete agreement as to the nature of the lands and the acreage involved."

No North Dakota governor has ever approved the conveyance of a waterfowl production area easement for a specific tract.[31]

C. Previous Gubernatorial Consents Do Not Authorize Any Further Acquisitions

Even if the previous gubernatorial consents were adequately specific, the record reveals that the United States has clearly acquired far more acreage than was authorized.

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[31] Previous gubernatorial consents were on a county-by-county basis and were apparently given before any tracts were ever selected as potential waterfowl production areas. J.A. 3-5.

The Court of Appeals, contrary to the facts of record, grossly understated the extent of waterfowl production area acreage already acquired in North Dakota.[32] The record does show that Governor Guy authorized the acquisition of easements over 1.2 million wetland acres for waterfowl production areas and Governor Link subsequently increased the authorization to over 1.25 million acres.[33]

However, without the consent and knowledge[34] of the governors, the Secretary of the Interior actually acquired about 4.8 million "waterfowl production area" easement acres—nearly 3.6 million acres more than were authorized.[35] All 4.8 million acres subject to these easements are, according to the Secretary of the Interior and a United States District Court ruling,[36] part of the National Wildlife Refuge System.

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[32] J.S. App. 23a.

[33] J.A. 4-5.

[34] The Full extent of the Secretaries' actions did not become apparent until the 1975 state legislative study (R. 5) and receipt of the interrogatory answers in 1979 (J.A. 47-53).

[35] J.A. 4-5. The 3.6 million acre difference is more than an accounting discrepancy. The Secretary initially identified and paid only for wetlands which could be identified on maps (documents identifying wetlands were frequently discarded). The Secretary, however, included in the legal description of the easement uplands surrounding the wetlands even though the acquisitions of such uplands have never been authorized by the governors. The uplands are also now considered by the United States to be a part of the National Wildlife Refuge System.

[36] *United States of America* v. *Welte*, No. C2-81-49 (D.N.D. March 1, 1982), appeal pending.

Thus, even if the consents given by Governors Guy and Link were sufficient to authorize *any* "waterfowl production area" acquisitions—which is very doubtful—the Secretary and FWS have already acquired almost four times the total acreage that those consents contemplated! It is nonsense to maintain that those consents, even if ever sufficient for any purpose, are sufficient now to authorize still further acquisitions. Therefore, the Secretary is not authorized to acquire further "waterfowl production area" interests in land in North Dakota, even if previous gubernatorial consents cannot be modified or withdrawn.

II.

The Gubernatorial Consent Required For The Acquisition Of Waterfowl Production Areas May Be Prospectively Withdrawn

A. The Power to Revoke

It has already been pointed out that the United States has heretofore acquired, under color of gubernatorial consent, almost four times as much "waterfowl production area" acreage in North Dakota as any previous consents could be construed to authorize. The State's position in this case, however, does not rest merely upon the manifest exhaustion of any such prior consents. Whatever force those prior consents might otherwise have had has clearly been abrogated by the 1977 North Dakota statutes here under challenge. If they are valid, these statutes, taken together, constitute at least a resolute effort prospectively to revoke or withdraw any earlier consent on behalf of North Dakota to "waterfowl production area" acquisitions.[17]

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[17] Although 16 U.S.C. §715k-5 provides for gubernatorial or administrative and not legislative consent, it is within the power of the legislature of the state to control the actions of the governor or ad-

It merits emphasis that North Dakota does not seek to unsettle property rights which the United States had acquired prior to the effective date of the statutes; the state is not attempting to revoke consents to previously acquired "waterfowl production areas". The revocation is prospective only. The principle of prospective revocability of consent is so well established in other areas of the law that the Court of Appeals' refusal to apply that principle here seems quite remarkable.

For example: This Court has recognized that a warrantless search can be rendered lawful by an individual's consent, see *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973); and in applying this consent rule the lower courts have recognized that the individual at any time, even after the search has commenced, may revoke his consent. While such revocation cannot render unlawful the search already completed, it does render unlawful any continuation of the search thereafter. *Mason* v. *Pulliam,* 557 F.2d 426 (5th Cir. 1977); *United States* v. *Miner,* 484 F.2d 1075 (9th Cir. 1973); *United States* v. *Bily,* 406 F. Supp. 725 (E.D. Pa. 1975). Similarly, a defendant's consent to a continuance may eliminate "speedy trial" impediments to the continuance of a criminal trial; but a timely withdrawal of such consent by the defendant can render the continuance unlawful. *Gravitt* v. *United States,* 523 U.S. 1211, 1217 n.9 (5th Cir. 1975). Again, the publication of private facts about a person without that person's consent may constitute a tort; and even if the information

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ministrators in this regard. N.D. Const., Art. V, sec. 5 provides that the Governor "shall expedite all such measures as may be resolved upon by the legislative assembly and shall take care that the laws be faithfully executed." It has not been suggested that the United States can subvert the policy-making processes of a State by authorizing a governor to act contrary to instructions of the legislature, which the State Constitution requires him to implement and obey. Indeed, any such suggestion would raise very serious issues under the principle of *National League of Cities* v. *Usery,* 426 U.S. 833 (1976).

is gathered pursuant to a consent to publicize, "if consent is withdrawn prior to the act of publicising, the consequent publicity is without consent." *Virgil* v. *Time, Inc.*, 527 F.2d 1122, 1127 (9th Cir. 1975).

This principle of the revocability of consent is even more appropriate where the consent involved is that, not of a private individual, but of a government or agency thereof enjoying some measure of sovereignty. Thus, for example, the consent of the United States to be sued for any type of claim may be withdrawn at any time, *Lynch* v. *United States*, 292 U.S. 571, 581-582 (1934), and cases there cited. "[T]he power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations." *Maricopa County* v. *Valley Bank*, 318 U.S. 357, 362 (1943). Likewise, the consent of a state to be sued may be withdrawn, *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527 (1858).

Nonetheless the Court of Appeals in this case held that the consent purportedly given for "waterfowl production area" acquisitions in North Dakota "cannot be revoked". To permit revocation, reasoned the Court of Appeals,

> would inject intolerable uncertainty into conservation planning and policy. It would subject every acquisition to the whim of changing state governments.

Presumably the judges below would have voted against subjecting acquisitions to state policy choices if they had been in Congress. Their role as judges, however, was not to countermand Congress' solicitousness for changing state political views. This Court has consistently admonished that the courts are not superlegislatures. *Hodel* v. *Indiana*, ____ U.S. ____, 69 L.Ed.2d 40, 56 (1981).

The Court of Appeals' view is fundamentally at odds with the principle of democratic government. This Court has had occasion before to recognize that successive incumbents of political

or administrative positions exercising discretion are free to make policy choices differing from those of their predecessors,[18] even on identical issues.

For example, in *Wilbur* v. *United States ex rel Kadrie,* 281 U.S. 206 (1930), there had been two contradictory decisions by two Secretaries of the Interior regarding the entitlement of certain children to interest payments from a statutorily created federal fund for Chippewa Indians: In 1919, the Secretary of the Interior ruled that the children were entitled to such payments; but in 1927, a later Secretary, based on a different interpretation of the statute, held that the children were not entitled to such payments. In response to the argument that the 1927 decision was void because one Secretary could not reconsider and revoke an earlier decision, the Court stated:

> The decision in 1919 was not a judgment pronounced in a judicial proceeding, but a ruling made by an executive of-

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[18] Indeed, the contention that succeeding administrators can be bound by the discretionary acts of a predecessor administrator is inconsistent with the position presently being maintained by the United States in other litigation involving North Dakota.

In a pending appeal before the United States Court of Appeals for the District of Columbia, the United States is challenging a 1977 agreement between former Secretary of the Interior Andrus and the National Audubon Society. Secretary Andrus agreed to indefinitely suspend construction on the authorized Garrison Diversion Unit and the United States District Court for the District of Columbia ruled that the agreement was binding on subsequent administrations.

In a brief, recently filed with the Court of Appeals, the United States argues:

> . . . where the laws leave room for the exercise of discretion, the executive branch must be free to implement those laws in a manner that is consistent with its own policies. It is only logical therefore that one administration cannot bind a subsequent administration in the exercise of its discretionary powers. [*National Audubon Society, Inc.* v. *Watt,* No. 81-1641 and 81-1763, Initial Brief at p. 18]

> ficer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exertion on that occasion, but was in its nature continuing. Under it the Secretary who made the decision could reconsider the matter and revoke the decision if found wrong; and so of his successor . . . The powers and duties of such an office are impersonal and unaffected by a change in the person holding it. [281 U.S. at 216-17]

In *West* v. *Standard Oil Co.*, 278 U.S. 200 (1929), the Supreme Court considered the validity of a Congressional transfer of federal land to the State of California. The statute authorizing the transfer limited it to land not known to have minerals. In 1921, then Secretary of the Interior Fall dismissed proceedings which might have established the mineral character of the land. His successor, Secretary Work, vacated the order and directed that a hearing commence. The oil company which had taken patents from the state pursuant to the federal transfer argued that the non-mineral character of the land had been conclusively established by a final determination of Secretary Fall. The Supreme Court disagreed, stating:

> If at the time of Secretary Work's order the Department still had jurisdiction of the land, he possessed the power to review the action of his predecessor and to deal with the matter as freely as he could have done if the dismissal of the proceedings had been his own act or that of a subordinate official. For, so long as the Department retains jurisdiction of the land, administrative orders concerning it are subject to revision. [278 U.S. at 210]

Thus, this Court has recognized that changing political leadership[19] must be allowed to control government policy if democracy is to be effective.

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[19] Certainly former North Dakota Governor Guy did not contemplate anything like an irrevocable consent when he signed various

B. The Reasons For Revocation

The importance of a state's ability to prospectively revoke its consent to acquisitions is well illustrated by the circumstances that led North Dakota to revoke in this case. Only four illustrations will be cited.

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approvals for "waterfowl production area" acquisitions. In an affidavit Governor Guy said:

> I disagree completely with conclusions stated in [a federal trial court brief]. It was never my intention that the authorizations would convey "full and unconditional approval to the Fish and Wildlife Service for the acquisition of . . . waterfowl easements." The authorizations were to be effective until modified or rescinded by me. I did not intend to bind my successor to these authorizations; further, it was my opinion that I could not bind my successor to such actions. It is apparent to me that the term "full and unconditional" is a self-serving editorial comment by the author of the memorandum; the term "full and unconditional" cannot be found in any authorization which has been signed by me. [J.A. 56.]

The statements of Governor Guy were never refuted in the summary judgment proceedings before the District Court. *Swan Lake Hunting Club* v. *United States*, 381 F.2d 238 (5th Cir. 1967) is the only authority cited by the Court of Appeals for its remarkable conclusion that the consent of previous North Dakota governors cannot now be withdrawn. In *Swan Lake*, however, the property in question had already been acquired by the United States pursuant to a "specific" gubernatorial consent which did not contain any material qualifications; three years later the former governor claimed that his earlier consent, despite its materially unqualified terms, had been meant to preclude the particular manner of acquisition that had been used and certain of the rights that had been acquired. *Swan Lake* is not a case of prospective revocation of consent and it provides no authority whatever for the Court of Appeals' rule that a consent, not yet utilized by the United States, may be withdrawn.

1. Incorporation Of Waterfowl Production Areas Into The National Wildlife Refuge System

Governors Guy and Link approved "the acquisition of easements by the United States of America . . . for Waterfowl Production Area purposes".[40] The form easement utilized by FWS personnel (prior to 1976) stated, in part:

> The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or recurring due to natural causes on the above-described tract, by ditching or any other means; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter recurs due to natural causes; and by not burning any areas covered with marsh vegetation. *It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part* and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, *and* that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above. [Emphasis supplied] [J.S. App. 7a]

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[40] J.A. 3-5.

By their consents to acquisitions on such terms, the governors only authorized, at most, a contractual agreement that a landowner would not drain, burn, or fill wetlands—a negative easement in gross.[41]

However, the enactment of the National Wildlife Refuge System Administration Act of 1966[42] created an entirely different situation. The Act declared that waterfowl production areas are a part of the National Wildlife Refuge System. "Easement violations" by landowners on privately owned land are no longer considered merely contractual transgressions, they are considered crimes and punished accordingly.[43] Further, and notwithstanding disclaimers on the face of the easement document, the United States now claims sweeping regulatory jurisdiction over the private lands subject to such easements.[44]

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[41] *United States* v. *Albrecht*, 496 F.2d 906, 909-910 (8th Cir. 1974).

[42] Pub. L. 89-669; 80 Stat. 927.

[43] Prosecutions are based on 16 U.S.C. §668dd(c) which provides, in part: "No person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the [National Wildlife Refuge] System". *United States of America* v. *Seest*, 631 F.2d 107 (8th Cir. 1980). Pending actions in North Dakota challenge the *Seest* ruling. *United States of America* v. *Welte*, No. C2-81-49 (D.N.D. March 1, 1982) appeal pending, and *Towner County Water Resource District* v. *Key*, No. A2-81-178 (D.N.D.). The two actions also raise a related issue: would the placement of private land, subject to a very limited waterfowl production area easement, into the National Wildlife System constitute an unconstitutional "taking".

[44] The federal claim is best understood by reviewing the regulations which govern the National Wildlife Refuge System at 50 CFR Subchapter C (1981). For example, the definitions in 50 CFR §25.12 indicate that private land subject to a waterfowl production area easement is a national wildlife refuge. In addition, 50 CFR Part 26 virtually prohibits any farming and ranching activity on private land subject to a waterfowl production area easement.

The most the governors ever consented to was the federal acquisition of a negative easement in gross. The United States, however, now claims that it may use such a consent not only to acquire easements but to place the private land subject to easement in a National Wildlife Refuge status.

No state should be faulted for attempting prospectively to revoke consent to further easement acquisitions under these circumstances.

2. **Misrepresentation by Federal Acquisition Personnel**

Landowners were assured, during negotiations when waterfowl production area easements were acquired, that certain local farming practices (e.g., the use of farm implements to drain shallow sloughs) would be authorized. However, when the landowners continued these farming practices after conveying the easements, enforcement action was threatened.

In *Werner* v. *U.S. Dept. of Interior, Fish and Wildlife,* 581 F.2d 168, 169-170 (8th Cir. 1978), the Court of Appeals said:

> In 1964, appellants or their predecessors in title were approached by Roy Brasch and William Resman, two employees of the Fish and Wildlife Service assigned to negotiate with local landowners to acquire wetlands easements. It is undisputed that in their negotiations with appellants, Brasch and Resman made oral representations to the effect that certain local farming practices, such as the use of plow furrows to drain shallow potholes and the burning of certain sloughs, would still be permitted under the terms of the proposed easements. These oral representations did not accord with the terms of the written easements which appellants and others ultimately signed.* * * Appellants claim that they were induced to sell the easements to the Fish and Wildlife Service by the false oral representations by Brasch and Resman. * * * By the late

1960's the Fish and Wildlife Service began enforcement against violations of the waterfowl easements created by certain farming practices.

The Court of Appeals, in *Werner,* declared that the written easements, rather than the oral representations, were controlling. The Court's decision did nothing to alleviate the illwill that was created by the misrepresentations.

3. The Starkweather Watershed Project.

The Devils Lake Basin was the scene for additional opposition to the FWS when, in late 1972, the Department of the Interior withdrew its support for the Starkweather Watershed Project.[43] The Starkweather Watershed Project was a comprehensive watershed management program designed to prevent recurrent flooding within the Devils Lake Basin. Records indicate that modern plans for the project were initiated in 1951 and that planning had led to a joint federal-state-local agreement in 1970 entitled "Agreement on Criteria for Wetlands Acquisition in the Starkweather Watershed." Pursuant to the agreement, thousands of acres of wetlands were acquired for the watershed project, but after the acquisition was completed, the Department of the Interior withdrew support for the project. The withdrawal of Interior support caused the Soil Conservation Service (SCS) to withdrawn its participation, thereby causing the collapse of the watershed project. Subsequent attempts (1973-1974) by the State to have the acquired wetlands returned were unsuccessful.

A portion of the project was subsequently built, over opposition from the Department of the Interior, with only state and local funds. *National Wildlife Federation* v. *Alexander,* 613 F.2d 1054 (D.C. Cir. 1979).

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[43] J.A. 57-63.

4. Controversies Concerning The Garrison Diversion Unit

When the Garrison Diversion Unit was "confirmed and approved in 1965,"[46] a fish and wildlife mitigation and enhancement plan was a part of the package. The authorized plan for the Initial Stage of the Garrison Diversion Unit contemplated the acquisition of 36 large fish and wildlife areas, totaling 146,530 acres, which would receive an assured water supply from project facilities. Pursuant to the plan, the State of North Dakota (through the Garrison Diversion Conservancy District, a political subdivision of the State) conveyed 15,910 acres of public land to the United States in 1971.

During 1974-1976, the FWS rejected the authorized mitigation and enhancement plan for the Garrison Diversion Unit and unilaterally adopted a "new concept" plan. The "new concept" required the acquisition of cropland for the restoration of drained wetlands whereas the authorized plan contemplated the acquisition of substantial public land and existing wetlands. In addition, the United States elected to keep the 15,910 acres of public land conveyed in 1971, but refused to give appropriate credit for the retained land. The United States District Court declared in 1981 that appropriate acreage credit must be given for the land conveyed to and retained by the United States. *Board of Directors, Garrison Diversion Conservancy District* v. *Andrus*, A2-80-22 (D.N.D. March 18, 1981).

The United States now maintains that, notwithstanding this record of federal misrepresentation and faithlessness, the State is precluded from protecting itself against further compounding of these insults and injuries to its citizens in the future. Having previously consented (if, indeed, even the prior consents were sufficient to be effective), the State is said to have surrendered

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[46] Pub. L. 89-108; 79 Stat. 433.

once and for all the role that Congress sought to guarantee it by making "specific" State consent a prerequisite to any "waterfowl production area" acquisition. Such an extraordinary proposition would seem to require strong arguments to support it in the face of Congress' apparent solicitude for the States' interests; yet no cogent argument at all has been put forward to rebut the usual principle of prospective revocability of consent.

III.

The Challenged States Statutes Are Permissible Conditions Or Qualifications To State Consent

The difficult circumstances resulting from abusive practices in connection with the "waterfowl production area" program, and discussed in the preceeding part of this brief, would be sufficient to justify the State of North Dakota in categorically refusing to give its consent to any further acquisitions for that program at all. While deeply concerned over those circumstances, however, North Dakota is committed to cooperation with the federal government in effective measures to assure ample fulfillment of wildlife conservation needs. Therefore, North Dakota has chosen not to categorically refuse the gubernatorial consent which Congress has made prerequisite to any further "waterfowl production area" acquisitions. Instead, by the statutes that have been called into question in this case, North Dakota has chosen to qualify or condition any consent to future acquisitions so as to ameliorate the unhappy circumstances which experience has taught it will otherwise ensue.

When Congress makes acquisitions dependent upon state consent, it must be contemplated that a state can refuse to consent. The inevitable effect of requiring state consent is cooperative dialogue and accommodation of state and national interests. If Congress had intended that the FWS ride roughshod over the interests of a State and its citizens,

singlemindedly to enlarge the domain under its control, requiring state consent to acquisitions would have been a very peculiar way to demonstrate that intent.

As a general rule, where one is granted a power to give or deny another his consent the power implies a right to impose conditions or qualifications upon the consent. This is most definitely true where not merely private individuals, but entities enjoying aspects of sovereignty, are concerned. The illustrations are so numerous that the task of assembling them is more tedious than difficult.

For example, even when consenting to the acquisition of federal enclaves under Article I, sec. 8, cl. 17 of the Constitution, a state may attach certain qualifications or conditions and even a right of reverter to its consent, *United States* v. *Tax Commission of Mississippi*, 412 U.S. 363, 372 n. 16 (1973); *Paul* v. *United States*, 371 U.S. 245, 265 (1962); *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 146-149 (1937). Likewise, when a state consents to be sued, any conditions or qualifications attached to that consent must be respected, *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858); *see also Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47, 54-55 (1944).

The same is true with regard to federal consents to be sued: "Congress may attach to its consent such conditions as it deems proper . . .," *Ex parte Bakelite Corporation*, 279 U.S. 438, 452 (1929). *See also Lehman* v. *Nakshian*, ____ U.S. ____, ____, 69 L.Ed.2d 548, 553 (1981); *Soriano* v. *United States*, 352 U.S. 270, 276 (1956); *United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941); *United States* v. *Esnault-Pelterie*, 303 U.S. 26, 28 (1938); *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U.S. 269, 273 (1931). Similarly, since the United States and its instrumentalities may be taxed by a state only pursuant to congressional consent, Congress can attach conditions to such consent. *First National Bank* v. *Anderson*, 269 U.S. 341, 347 (1926); *Des Moines National Bank* v. *Fairweather*, 263 U.S.

103, 106 (1923); *see also Maricopa County* v. *Valley Bank*, 318 U.S. 357, 361 (1943). Having power to grant or deny consent for one to engage in interstate commerce, Congress may place conditions upon that consent, *Parden* v. *Terminal Railway*, 377 U.S. 184, 192-193 (1964). And, having power to grant or withhold consent to interstate compacts, Congress can grant consent subject to conditions, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959).

Congress may condition its consent to state jurisdiction over causes of action between Indians or arising in Indian country upon the agreement of the affected tribe being manifested in a particular manner, *Kennerly* v. *District Court*, 400 U.S. 423 (1971). Furthermore, where Congress has made the consent of the state a prerequisite to that state's incurring the responsibility of jurisdiction over civil and criminal matters involving Indians or Indian lands, the state may condition its consent upon the request of the affected Indian tribes, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 493-499 (1979).

It may be conceeded for purposes of this case that if Congress had wanted to deprive the states of their option to condition or qualify their "specific" consent under 16 U.S.C. §715k-5, Congress would have done so. But Congress did not elect to do so: the right to give or deny their consent is conferred upon the states without limitation.

Nonetheless the United States argues that the particular conditions North Dakota has attached to its willingness to consent to further "waterfowl production area" acquisitions after July 1, 1977, by the statutes called into question in this case are void because of preemption. It is said that these statutory provisions "frustrate the full objectives of Congress," Motion to Affirm, p. 11.

Courts are not free to substitute their wisdom for that of Congress as to what are the objectives of federal legislation or as

to the means by which those objectives are to be attained. When Congress' policy is to enlist state participation in cooperatively resolving the various problems involved in an enterprise, that policy itself can be frustrated by judicial efforts to produce more expeditious progress toward some hypothesized goal.

A court should be hesitant to find preemption:

> It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed. *Schwartz* v. *Texas,* 344 U.S. 199, 202-203 (1952).

This is not a case where inferences must be drawn from the nature of the subject matter; Congress has specifically ordained the prerequisite of state consent. In such a situation, even if the result were inconsistent with the overall purpose of waterfowl conservation the decision of Congress to compromise that purpose would have to be respected:

> There is thus conflict between state and federal law; but it is a conflict sanctioned by Congress with directions to give the right of way to state laws . . . Where Congress gives state policy that degree of overriding authority, we are reluctant to conclude that

there is preemption. *Retail Clerks Local 1625* v. *Schermerhorn,* 375 U.S. 96, 103 (1963).

A recent survey of this Court's preemption decisions concluded that:

> State laws protecting vital state interests are generally preserved by a heavy presumption against preemption. These laws have been preempted only in cases involving express preemption and prohibition of dutiful conduct, and in very rare cases of hindrance of national policy. Even state attempts at territorial protection of less-than-vital in-

> terests have received considerable protection. In a large number of cases national and state governments have been allowed to work together to protect people inside state borders. Some of the credit for this protection must go to the Supreme Court, which in preemption cases has attempted to ensure that both governments could perform their fundamental functions.

Comment, "A Framework for Preemption Analysis," 88 Yale L.J. 363, at 389 (1978).

It is also significant here that Congress has repeatedly refused to repeal the statutory prerequisite of gubernatorial consent to acquisitions,[47] despite the same arguments now put forward in this judicial forum. It is clear that Congress deems it wise policy to continue the state role in this process, which FWS asks this Court to curtail.

In any event, the North Dakota statutes under challenge here do not interfere with or frustrate the objectives of the federal statutes pertaining to waterfowl conservation.

A. Section 47-05-02.1 Of The North Dakota Century Code, Which Limits All Easements In North Dakota To 99 Years And Requires That All Easements "Be Properly Described," Is A Proper Exercise Of State Power.

This statute prospectively places a time limit upon all easements which would be acquired in North Dakota after July 1, 1977. The time limit is 99 years—one year short of a century.

The record is totally devoid of any reason why a 99-year easement limit should be unconstitutional. Indeed, there was no evidence submitted to the lower courts indicating that the easement program was jeopardized by the 99-year limitation.

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[47] See p. 15 *supra*.

Rather, the United States admitted it could "live with" this state law.[48]

The obvious reason for the scanty record is that there are no logical arguments against the 99-year limitations. Until 1962, the Secretary had not been buying perpetual easements—most were for 30 years or 99 years.[49]

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[48] Pursuant to Rule 10(c), Federal Rules of Appellate Procedure, a statement of the March 17, 1980, hearing was presented to the United States Attorney; no objection was received from the United States and the Statement of the Proceedings was filed with the Court. The Statement relates an admission that the United States could "live with" N.D. Cent. Code § 47-05-02.1.

[49] In the 1962 hearings on legislation to authorize increased payments to counties for wildlife refuges, the following dialogue is found between Mr. Dingell and the Director of the Bureau of Sport Fisheries and Wildlife:

> MR. DINGELL. I am concerned about this business of your acquiring lands by easement. You are only getting 20-year easements on these lands, are you not?
>
> MR. JANZEN. We have said nothing less than 20 years. We are taking 30-year and 99-year easements. We are trying to take them for as long as we can.
>
> MR. DINGELL. How are you going to have any continuity in the program if you have 20-year leases?
>
> MR. JANZEN. There are two reasons why we have to look to the easement problem to help us solve our overall problem.
>
> MR. DINGELL. A shortage of money?
>
> MR. JANZEN. Not that so much as, in many cases, landowners or farmers simply will not sell a piece of land out of their farm. They may have 10 potholes of 1, 2, or 3 acres each. They simply will not sell these potholes to the Federal Government.
>
> MR. DINGELL. Why not?

This Court has consistently declared that "property ownership is not governed by a general federal law, but rather by the laws of the several states" in our federal system. *State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). State law can even prevent a state's citizens from conveying land to the federal government. *United States* v. *Burnison*, 339 U.S. 87 (1950).

B. Section 20.1-02-18.1 Of The North Dakota Century Code, Which Established Procedures For Public Participation In The Decision-Making Process Concerning Fee And Easement Acquisitions By The United States, Is A Proper Exercise Of State Power.

This statute directs review by local officials, inspection of the tract to be acquired, an opportunity for public comment, notice of the proposed acquisition, and the preparation of a detailed economic analysis. The United States has sought public par-

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> MR. JANZEN. Because it would just make a hodgepodge of their ownership. They would have no control over who would be running over their properties. They might be in the middle of a wheat field, middle of a pasture, but by giving us the right, or, we might say, buying the right to not drain, burn, or fill, we assure the retention of these depressions, so that when there is enough rainfall they will hold water and will product [sic] the ducks. This is the main reason why we are doing this.
>
> MR. DINGEL. Can you not get a perpetual easement for this purpose?
>
> MR. JANZEN. We have discussed the perpetual easement and it appears, in the eyes of the law, that we are on a sounder basis if we have a term rather than on a perpetual basis.

Hearings before the Subcommittee on Fisheries and Wildlife Conservation, Eighty-Seventh Congress, 2d Session, 84-85 (1962). See f.n. 23.

ticipation at least since 1961[50] and continues today in neighboring Minnesota.[51]

Since this statute only formalizes a long-standing practice which has been recognized and respected by the United States for two decades, it can hardly be said to frustrate the objectives of the federal acquisition program.

C. Section 20.1-02-18.2 Of The North Dakota Century Code, Which Places Certain Limitations Upon Easements Acquired By The United States With Moneys From The Migratory Bird Conservation Fund, Is A Proper Exercise Of State Power.

This statute merely confirms the power the landowner already had to negotiate the terms of an easement.

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[50] See *Swan Lake Hunting Club* v. *United States*, 381 F.2d 238, 243 (5th Cir. 1967). The North Dakota practice was explained to Congress in 1964. Game and Fish Commissioner Stuart said, during hearings on bills to increase payments to counties in which federal wildlife refuges are located:

> When the Public Law 87-383 was put into effect, there was a clause in there wherein the Governor of the respective State where the purchase was being done has the power to veto. In North Dakota I conferred with Governor Guy, and he put it on this basis—that we would submit the application from the Fish and Wildlife Service to the respective counties. If the county commissioners approved of this acquisition, then it was just automatic. The Governor would OK it and it would go down through channels and back to the Fish and Wildlife Service. [Hearing before the Committee on Commerce, 88th Congress, Second Session, February 21, 1964, p. 70]

[51] See fn. 20, *supra*.

The State of North Dakota considers this to be a common-sense law—certainly not unconstitutional. The United States apparently now agrees.[32]

D. Section 20.1-02-18.3 Of The North Dakota Century Code, Which Suspended Legislative Consent To Federal Acquisitions For Migratory Bird Reservations Under The Migratory Bird Conservation Act, Is A Proper Exercise Of State Power.

The Migratory Bird Conservation Act, as amended, prohibits the federal acquisition of inviolate sanctuaries unless the state consents "by law". 16 U.S.C. §715f. Legislative consent has been suspended until December 31, 1983. The state's authority to withdraw its previous legislative consent is as clear as its authority to withdraw gubernatorial consents.

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[32] . . . in our view, N.D. Cent. Code §20.1-02-18.2 (1978), as amended . . ., which merely permits a landowner to

> [n]egotiate the time period of the lease, easement, or servitude being sought,

does not conflict with federal statutory law or policy and therefore is applicable to acquisitions that already have been approved, since it affords the landowner no rights that he would not have in the absence of such legislation. [Motion to Affirm, p. 10, f.n. 5]

CONCLUSION

For the reasons stated above, the State of North Dakota respectfully requests that the decision of the Court of Appeals be reversed.

Respectfully submitted,

ROBERT O. WEFALD
Attorney General

MURRAY G. SAGSVEEN
Special Assistant Attorney General
Zuger & Bucklin
P.O. Box 1695
Bismarck, ND 58502
(701) 223-2711

DAVID E. ENGDAHL
Of Counsel
University of Puget Sound
School of Law
950 Broadway Plaza
Tacoma, WA 98402
(206) 756-3485

Appellee's Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1981

NORTH DAKOTA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

BARBARA E. ETKIND
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether gubernatorial consent to the United States' acquisition of wetlands within a State, once given, can be revoked at any time prior to actual consummation of the acquisition.

2. Whether, assuming such gubernatorial consent is not revocable, state legislation may validly restrict or qualify the right of the United States to acquire wetlands easements pursuant to previously given, but not yet exercised, gubernatorial consent.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
1. Introduction and federal statutory background concerning the United States' right to acquire waterfowl production areas	2
2. Events in North Dakota	7
3. The present case	10
Summary of argument	12
Argument	16
I. The United States has obtained the requisite gubernatorial consent to its acquisition of easements over lands located in North Dakota for use as waterfowl production areas and that consent remains in effect	16
A. The United States has obtained the requisite gubernatorial consent to its acquisition of an additional approximately 750,000 acres of wetlands in North Dakota for use as waterfowl production areas	17
B. Gubernatorial consent to the United States' acquisition of waterfowl production areas, once given, cannot be revoked	22
II. N.D. CENT. CODE §§ 47-05-02.1.2, 20.1-02-18.1, 20.1-02-18.2 and 20.1-02.18.3, as applied here, impermissibly revoke, limit or qualify previously given gubernatorial consent to acquisitions by the United States in derogation of federal law and therefore violate the Supremacy Clause	30
Conclusion	42

TABLE OF AUTHORITIES

Cases: Page

E.I. DuPont De Nemours & Co. v. *Collins*, 432 U.S. 46 21
EPA v. *State Water Resources Control Board*, 426 U.S. 200 28
Haig v. *Agee*, 453 U.S. 280 23
Hancock v. *Train*, 426 U.S. 167 28
Hines v. *Davidowitz*, 312 U.S. 52 ..... 15, 16, 31, 36
Howe v. *Smith*, 452 U.S. 473 23
Kohl v. *United States*, 91 U.S. 367 29
Missouri v. *Holland*, 252 U.S. 416 33
Nash v. *Florida Industrial Commission*, 389 U.S. 235 31
Paul v. *United States*, 371 U.S. 245 ..... 28, 29
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 ... 21
Reiter v. *Sonotone Corp.*, 442 U.S. 300 23
Swan Lake Hunting Club v. *United States*, 381 F.2d 238 ..... 20, 24, 29
Towner County Water District v. *Key*, Civ. No. A2-81-178 (D.N.D., filed Nov. 17, 1981) 19
Transamerica Mortgage Advisers, Inc. v. *Lewis*, 444 U.S. 11 23
Udall v. *Tallman*, 380 U.S. 1 21
United States v. *Albrecht*, 496 F.2d 906 ..... 3, 35
United States v. *Burnison*, 339 U.S. 87 29
United States v. *Fox*, 94 U.S. 315 29
United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 ..... 15, 16, 33, 34, 35, 36
United States v. *Universal C.I.T. Corp.*, 344 U.S. 218 28
West v. *Standard Oil Co.*, 278 U.S. 200 22
Wilbur v. *United States*, 281 U.S. 206 22

Constitution, treaties, statutes and regulations:

United States Constitution:

Article I, Section 8, Clause 17 29
Article IV, Clause 2 (Supremacy Clause) ... 2, 36-37, 40
Tenth Amendment 29

Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-Union of Soviet Socialist Republics, 29 U.S.T. 4647, T.I.A.S. No. 9073 3

Constitution, treaties, statutes and regulations—Continued Page

Convention for the Protection of Birds and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 3
Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain, 39 Stat. 1702 3, 31
Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1963, United States-Mexico, 50 Stat. 1311, T.S. No. 912 3
Migratory Bird Conservation Act of 1929, ch. 257, 45 Stat. 1222 32

16 U.S.C. (& Supp. IV) 715 *et seq.* . 3, 5, 16, 17, 32, 41
16 U.S.C. 715a 5, 32
16 U.S.C. (& Supp. IV) 715d 5, 32
16 U.S.C. 715f 5, 11, 36, 41
16 U.S.C. 715i(a) 32
16 U.S.C. 715j 32

Migratory Bird Hunting Stamp Act of 1934, ch. 71, 48 Stat. 451, as amended, 16 U.S.C. (& Supp. IV) 718 *et seq.* 3, 4, 33, 41

Section 4(a), 48 Stat. 452 4-5
16 U.S.C. 718d 2, 5
16 U.S.C. 718d(c) 2, 5, 11, 16, 34, 35

Migratory Bird Treaty Act, ch. 128, 40 Stat. 755, as amended, 16 U.S.C. (& Supp. IV) 703 *et seq.* 31-32

Wetlands Loan Act of 1961, Pub. L. No. 87-383, 75 Stat. 813, as amended, 16 U.S.C. 715k-3 to 715k-5 ..... *passim*

Section 3, 16 U.S.C. 715k-5 ..... *passim*

Wetlands Loan Extension Act of 1976, Pub. L. No. 94-215, 90 Stat. 189 6
16 U.S.C. 701 ..... 2, 31
16 U.S.C. (Supp. IV) 712(2) 32
72 Stat. 486, 487 (16 U.S.C. 718d(c)) 5
Pub. L. No. 90-205, 81 Stat. 612 6

Constitution, treaties, statutes and regulations—Continued Page

N.D. Cent. Code:

§ 20.1-02-18 (Repl. 1978) 10, 41
§ 20.1-02-18.1 (Repl. 1978) 9, 10, 30, 38, 39
§ 20.1-02-18.2 (Repl. 1978) 9, 10, 31, 40
§ 20.1-02-18.2(1) (Repl. 1978) 39
§ 20.1-02-18.2(2) (Repl. 1978) 40
§ 20.1-02-18.3 (Interim Supp. (Pt. 1) 1981) 30-31, 41
§ 47.05-02.1 (Repl. 1978) 9
§ 47.05-02.1(2) (Repl. 1978) 30, 37

1931 N.D. Sess. Laws ch. 207 5
1981 N.D. Sess. Laws ch. 257, § 1 10

50 C.F.R. Subchapter C 18

Part 25, Subparts A and D 18

Part 27:

Section 27.11 18
Section 27.51 18
Section 27.61 18
Section 27.84 18
Section 27.92 18
Section 27.94(a) 18
Section 27.95(a) 18
Section 28.11 18
Section 28.21 19
Section 28.31 19
Section 28.32(a) 19

Part 29, Subpart B 19

Miscellaneous:

107 Cong. Rec. 17171 (1961) 20, 25
107 Cong. Rec. 12203 (1961) 14
2 G. Thompson, *Commentaries on the Modern Law of Real Property* (Repl. 1980) 18

Miscellaneous—Continued Page

Authorize Increased Payments to Counties for Wildlife Refuges: Hearings on H.R. 10714, H.R. 11525, H.R. 11535, H.R. 12143, and H.R. 12144 (H.R. 12145) Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 87th Cong., 2d Sess. (1962) 7, 37
H.R. Conf. Rep. No. 1184, 87 Cong., 1st Sess. (1961) 25
H.R. Rep. No. 545, 87th Cong., 1st Sess. (1961) ... 4, 6, 27
H.R. Rep. No. 2182, 85th Cong., 2d Sess. (1958) 4
Migratory Waterfowl Conservation and Wolf Creek, Ky. Fish Hatchery: Hearings on H.R. 354, H.R. 480, H.R. 4216, H.R. 8348, H.R. 481, H.R. 1019, H.R. 3538, H.R. 5768, H.R. 482, H.R. 490 and H.R. 497 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 90th Cong., 1st Sess. (1967) 38
More Equitable Payments to Counties Having Wildlife Refuges: Hearings on S. 179, S. 1363, S. 1720, and S. 2498 Before the Senate Comm. on Commerce, 88th Cong., 2d Sess. (1964) 7
S. Rep. No. 1426, 85th Cong., 2d Sess. (1958) 4, 6
S. Rep. No. 705, 87th Cong., 1st Sess. (1961) ... 4, 6, 25, 26
Wetlands Acquisition and Oil Pollution of the Sea: Hearings on S. 2187, S. 2175 and H.R. 7391 Before the Subcomm. on Merchant Marine and Fisheries of the Senate Comm. on Commerce, 87th Cong., 1st Sess. (1961) 7

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-773

NORTH DAKOTA, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. 18a-32a) is reported at 650 F.2d 911. The opinion of the district court (J.S. App. 8a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1981 (J.S. App. 18a), and a petition for rehearing was denied on July 21, 1981 (J.S. App. 32a). The notice of appeal (J.S. App. 33a) was filed on September 18, 1981, and this Court noted probable jurisdiction on March 1, 1982. The jurisdiction of this Court rests on 28 U.S..C 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The relevant portions of the Migratory Bird Hunting Stamp Act of 1934, 16 U.S.C. 718d, the Wetlands Loan Act of 1961, 16 U.S.C. 715k-5, and the North Dakota Century Code appear at J.S. App. 1a-6a.

STATEMENT

1. Introduction and Federal Statutory Background Concerning the United States' Right to Acquire Waterfowl Production Areas

This case involves the efforts of the United States Department of the Interior, through its Fish and Wildlife Service, to preserve and protect migratory waterfowl by acquiring lands and interests in land so as to restrict private actions that would adversely affect the waterfowl's habitats, including their breeding and nesting places—known as "waterfowl production areas" (16 U.S.C. 718d(c)).[1] Waterfowl require wetlands, such as

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[1] The Secretary of the Interior is charged with "the preservation, distribution, introduction and restoration of game birds and other wild birds." 16 U.S.C. 701. Over the years, Congress has enacted several statutes granting the Secretary comprehensive powers to protect, conserve, and restore migratory birds, including the authority to acquire lands and interests therein for the purpose of conserv-

marshes, swamps and potholes, which retain the rain and other available moisture, in order to breed and raise their young.[2] While originally there were approximately 127 million acres of wetlands in the contiguous 48 states, the

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ing migratory birds. See, *e.g.*, the Migratory Bird Conservation Act of 1929, as amended, 16 U.S.C. (& Supp. IV) 715 *et seq.*, the Migratory Bird Hunting Stamp Act of 1934, as amended, 16 U.S.C. (& Supp. IV) 718 *et seq.*; the Wetlands Loan Act of 1961, as amended, 16 U.S.C. 715k-3 to 715k-5. The United States also has entered into several treaties in which it has agreed to cooperate in the protection and conservation of migratory birds. See Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States-Union of Soviet Socialist Republics, 29 U.S.T. 4647, T.I.A.S. No. 9073; Convention for the Protection of Birds and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990; Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1963, United States-Mexico, 50 Stat. 1311, T.S. No. 912; Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain, 39 Stat. 1702.

[2] The Eighth Circuit has characterized the typical waterfowl production area and described the important role that the "potholes" play in the waterfowl's breeding cycle as follows (*United States* v. *Albrecht*, 496 F.2d 906, 908 (1974)):

> Each square mile of such land is dotted by approximately 70 to 80 potholes of three to four feet deep. The prairie pothole region is further divided into different classifications depending on geographical and climatological attributes that allow the retention of water through a certain number of summer days. The Albrechts' land is classified as pothole land that 42 per cent of the breeding duck prefer, particularly because the potholes usually retain water through July or August, and therefore, provide an excellent environment for the production of aquatic invertebrates and aquatic plants, the basic foods for breeding adult ducks and their offspring. Essential to the maintenance of the land as a waterfowl production area is the availability of shallow water in these numerous potholes during the usually drier summer months. On the other hand, too much water, as a lake area with its deeper waters, does not provide the proper habitat for many species of duck to rear their young. Also, for the protection of their young, many species of duck prefer to be isolated in a small pothole, rather than to share a large lake.

continued rise in population and the attendant development of previously untouched lands for residential, commercial and agricultural purposes have destroyed much of the land previously available for waterfowl breeding and nesting. H.R. Rep. No. 545, 87th Cong., 1st Sess. 1 (1961); S. Rep. No. 705, 87th Cong., 1st Sess. 2, 4 (1961); H.R. Rep. No. 2182, 85th Cong., 2d Sess. 1 (1958). Indeed, by 1961, only 22.5 of the original 127 million acres of wetlands were still "of significant value for migratory waterfowl use." H.R. Rep. No. 545, *supra*, at 1, 3; S. Rep. No. 705, *supra*, at 2, 4. Accordingly, there was devised a special program of federal acquisition "to preserve sufficient acreage to provide essential breeding, feeding, resting and wintering areas in this country to accommodate the needs of migratory waterfowl." S. Rep. No. 1426, 85th Cong., 2d Sess. 7 (1958); see also S. Rep. No. 705, *supra*, at 4; H.R. Rep. No. 545, *supra*, at 1-3.

Specific statutory authority for the federal acquisition of "waterfowl production areas" was first provided in a 1958 amendment to the Migratory Bird Hunting Stamp Act of 1934, ch. 71, 48 Stat. 451, as amended, 16 U.S.C. 718 *et seq.* The Migratory Bird Hunting Stamp Act, or "Duck Stamp Act," as it is popularly known, requires hunters of migratory waterfowl to purchase special stamps ("duck stamps") and to carry the stamps with them while they are hunting. The proceeds from the sale of the duck stamps are paid into the United States Treasury and set aside as a special fund known as the Migratory Bird Conservation Fund. The Fund originally was intended to pay for "the location, ascertainment, acquisition, administration, maintenance, and development of suitable areas for inviolate migratory-bird sanctuaries, under the provisions of the Migratory Bird Con-

servation Act * * *." Section 4(a), 48 Stat. 452.[3] The 1958 amendment to the Duck Stamp Act (72 Stat. 486, 487, codified at 16 U.S.C. 718d(c)) specifically authorized the use of the Fund "to acquire, or defray the expense incident to the acquisition * * * of, small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto." The amendment further provided that "[s]uch small areas, to be designated as 'Waterfowl Production Areas,' may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act * * *."[4]

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[3] The Migratory Bird Conservation Act of 1929, as amended, 16 U.S.C. (& Supp. IV) 715 *et seq.*, authorizes the Secretary to purchase or rent any area of land or water or any interest in any such area "for use as inviolate sanctuaries for migratory birds" where such purchase or rental has been approved by the Migratory Bird Conservation Commission established by the Act. 16 U.S.C. 715a, 715d.

[4] One of the "limitations and requirements" of the Migratory Bird Conservation Act is that no deed or other instrument of conveyance may be accepted by the Secretary "unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State." 16 U.S.C. 715f. In 1931, North Dakota gave its unconditional legislative consent to the United States' acquisition "by purchase, gift, devise, or lease of such areas of land or water, or of land and water, in the State of North Dakota, as the United States may deem necessary for the establishment of migratory bird reservations in accordance with [the Migratory Bird Conservation Act]." 1931 N.D. Sess. Laws ch. 207.

Both parties agree that 16 U.S.C. 715f's requirement of state legislative consent to the United States' acquisition of inviolate sanctuaries under the Migratory Bird Conservation Act has no application to the government's acquisition of waterfowl production areas under the Duck Stamp Act, 16 U.S.C. 718d(c) (see N.D. Br. 20). Nor does the United States contend that North Dakota's *legislative* consent to federal acquisitions under the Migratory Bird Conservation Act satisfies 16 U.S.C. 715k-3's requirement of *gubernatorial* consent to acquisitions made with moneys from the Migratory Bird Conservation Fund (see pages 6, 16, *infra*).

In 1961, Congress was advised that because of the rapid rate at which existing wetlands were being drained the revenues normally accruing to the Fund from the sale of the duck stamps were inadequate to finance the acquisition of sufficient waterfowl production areas to maintain desired waterfowl populations and distributions. H.R. Rep. No. 545, *supra*, at 1-2; S. Rep. No. 705, *supra*, at 2. Congress responded by enacting the Wetlands Loan Act of 1961, as amended, 16 U.S.C. 715k-3 to 715k-5, which authorized the appropriation of moneys as interest-free advances to the Migratory Bird Conservation Fund. Section 3 of the 1961 Act, 16 U.S.C. 715k-5, concludes with the proviso that "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency."[5]

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[5] The 1961 Act authorized the appropriation of $105 million over a seven-year period ending in 1968, with repayment to the United States Treasury out of moneys accruing to the Migratory Bird Conservation Fund from the sale of duck stamps to commence in 1969. Pub. L. No. 87-383, 75 Stat. 813. In 1967, Congress extended the period during which funds could be appropriated under the Wetlands Loan Act for an additional eight years and delayed until 1977 the commencement of the period for repayment of such funds. Pub. L. No. 90-205, 81 Stat. 612. Finally, the Wetlands Loan Extension Act of 1976, Pub. L. No. 94-215, 90 Stat. 189, extended until 1983 the period during which funds could be appropriated for the acquisition of wetlands under the Wetlands Loan Act of 1961, increased the maximum amount authorized to be appropriated by $95 million, for a total of $200 million, and deferred commencement of the repayment of such advances out of the proceeds of the sale of duck stamps until October 1, 1983.

2. Events in North Dakota

a. The principal waterfowl breeding grounds in the continental United States are located in what are known as the "prairie pothole states"—the Dakotas, Minnesota and Montana. S. Rep. No. 1426, *supra*, at 2, 7. See also *Wetlands Acquisition and Oil Pollution of the Sea: Hearings on S.2187, S.2175 and H.R. 7391 Before the Subcomm. on Merchant Marine and Fisheries of the Senate Comm. on Commerce*, 87th Cong., 1st Sess. 23, 28 (1961).[6] By the time of the enactment of the Wetlands Loan Act of 1961, however, about one-half of the important waterfowl production habitat located in those states already had been destroyed. S. Rep. No. 705, *supra*, at 2. The Secretary, therefore, has placed a high priority on the purchase of wetlands and wetlands easements in North Dakota.

Immediately upon passage of the Wetlands Loan Act in 1961, the Fish and Wildlife Service sought to obtain the consent of the Governor of North Dakota to such acquisitions by the United States. William L. Guy, who served as governor of North Dakota from 1961 through 1972,

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[6] North Dakota, in particular, has been designated " 'the duck factory of the United States.' " *Authorize Increased Payments to Counties for Wildlife Refuges: Hearings on H.R. 10714, H.R. 11525, H.R. 11535, H.R. 12143, and H.R. 12144 (H.R. 12145) Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 2d Sess. 11 (1962). See also *More Equitable Payments to Counties Having Wildlife Refuges: Hearings on S. 179, S. 1363, S. 1720, and S. 2498 Before the Senate Comm. on Commerce*, 88th Cong., 2d Sess. 65 (1964) (statement by Russell Stuart, Commissioner, Game and Fish Department, State of North Dakota) ("From the standpoint of duck production, North Dakota is the most important State in the coterminous United States. Approximately two-thirds of the State are in the prairie pothole region of the North American Continent").

gave advance approval to the United States' acquisition of wetlands acreage for waterfowl easements in each of North Dakota's 41 counties on a county-by-county basis, setting forth the maximum wetlands acreage that could be acquired in each county. Between 1973 and 1977, former Governor Link gave like advance approval for acquisition of additional wetlands easements. These consents by the two governors cover a total of 1,517,437 acres (J.A. 3-5, 47-48, 54-55).[7] Pursuant to those consents, the United States to date has acquired permanent easements covering 764,522 wetlands acres in North Dakota under the Waterfowl Production Areas program (J.A. 48).[8] The unused consents already obtained therefore cover approximately another 750,000 acres. This is more than sufficient acreage to enable the Fish and Wild-

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[7] Governor Link also made some slight adjustments with respect to two of the consents previously given by Governor Guy (J.A. 4). Those adjustments, however, merely increased the amount of acreage available for easement acquisition by the United States in one county (Nelson) and decreased the available acreage in another county (Benson) by the same amount; they had no effect on the total amount of acreage, acquisition of which Governor Guy previously had approved.

[8] These easements typically provide that, in exchange for a monetary payment by the United States, the owner of the servient estate and his successors will not take certain actions specified in the easement document, *i.e.*, draining, filling, burning or leveling of the wetlands, since such actions are inconsistent with the preservation of the covered lands as wetlands (see, *e.g.*, J.A. 15-16). North Dakota asserts (Br. 7 n.11, 20-22) that the United States already has acquired easement interests in more than 4.8 million acres in North Dakota. While the total acreage *described* in the easement documents is approximately 4.8 million acres, the restrictions on draining, burning, filling, and leveling apply only to the 764,522 acres of *wetlands* occurring on the 4.8 million gross acres (see discussion at pages 17-19, *infra*).

life Service to meet all of its wetlands easements acquisition objectives for waterfowl production areas in North Dakota (J.S. App. 23a).[9]

b. Beginning in 1977, North Dakota enacted legislation purporting to impose several procedural requirements and substantive limitations on federal land acquisitions undertaken for the purpose of conserving waterfowl and wildlife.

First, N.D. Cent. Code § 47-05-02.1 (Repl. 1978), among other things, restricts real property easements, servitudes, or any nonappurtenant restrictions on the use of real property that become binding after July 1, 1977, to a maximum duration of 99 years.

N.D. Cent. Code § 20.1-02-18.1 (Repl. 1978) directs the Governor to refer requests from the Secretary of the Interior for land acquisition approvals to the board of commissioners of the county in which the land sought to be acquired is located, and requires the Governor to obtain an affirmative recommendation by the commissioners before he approves each acquisition. Section 20.1-02-18.1 also requires the Secretary to submit a detailed impact analysis with each individual acquisition proposal and directs the county agent to prepare another impact analysis for the board of commissioners' consideration, the expense of which is to be borne by the Department of the Interior.

N.D. Cent. Code § 20.1-02-18.2 (Interim Supp. (Pt. 1) 1981) provides, *inter alia*, that a landowner may negoti-

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[9] The Fish and Wildlife Service's national goal for acquisition of permanent waterfowl production area easements is 1.6 million wetlands acres, of which 989,135 wetlands acres are to be located in North Dakota (Complaint ¶ 12; J.A. 50). The Service thus intends to acquire easements over 224,613 additional wetlands acres located in North Dakota.

ate the terms of a lease, easement, or servitude sought to be acquired by the Department of the Interior with moneys from the Migratory Bird Conservation Fund. The statute may also be construed as permitting the landowner to drain after-expanded wetlands notwithstanding a provision to the contrary in the easement document. [10]

N.D. Cent. Code § 20.1-02-18 (Repl. 1978) purports to subject the State's previous unconditional legislative consent to the United States' acquisition of lands in North Dakota for purposes of the Migratory Bird Conservation Act (see note 4, *supra*) to the conditions and limitations set forth in Sections 20.1-02-18.1 and 20.1-02-18.2.

Finally, in 1981, North Dakota enacted Section 20.1-02-18.3, which provides that the United States shall not acquire by any means lands or interests in lands located in North Dakota for migratory bird reservations and purports to suspend the authority of the Governor to approve acquisitions of lands or interests in lands with moneys from the Migratory Bird Conservation Fund.

3. The Present Case

Shortly after North Dakota enacted the 1977 legislation, the United States negotiated a contract with private landowners for the purchase of a permanent waterfowl easement over wetlands, acquisition of which already had been authorized by the Governor (J.A. 14-18). Because of the uncertainty concerning the landowners' ability to convey a permanent easement created by the state legislation, however, the United States did not finalize this

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[10] The most onerous aspect of this section, which provided that "[a] lease, easement, or servitude shall terminate upon the death of a landowner or upon change of ownership," was repealed in March 1981 (N.D. Sess. Laws ch. 257, § 1).

negotiated conveyance nor has it consummated other similar transactions. In fact, since 1977, the federal acquisition program in North Dakota has come to a standstill.

The United States commenced this action in the United States District Court for the District of North Dakota, seeking a declaratory judgment to the effect that neither the 1977 state legislation nor 16 U.S.C. 715f (the state legislative consent provision of the Migratory Bird Conservation Act, note 4, *supra*) is applicable to federal land acquisitions for waterfowl production areas pursuant to 16 U.S.C. 718d(c) that previously have received gubernatorial approval. The district court entered summary judgment in favor of the United States (J.S. App. 8a-13a). The court held (*id.* at 11a) that neither state legislative nor gubernatorial consent is a prerequisite to the United States' acquisition of interests in land for use as waterfowl production areas. The court further found (*id.* at 12a) that the 1977 legislation, insofar as it purports to restrict federal acquisitions for the waterfowl production areas program, "stand[s] as an obstacle to the accomplishment and execution of valid purposes and objectives of Congress" and, under the Supremacy Clause, must yield to the overriding federal law.

The court of appeals affirmed (J.S. App. 18a-32a). That court agreed (*id.* at 26a-27a) with the district court that neither 16 U.S.C. 715f nor 16 U.S.C. 715k-5 requires the United States to obtain state legislative or gubernatorial consent to acquisitions of waterfowl production areas. In the alternative, the court of appeals held (J.S. App. 27a-29a) that even if gubernatorial consent were required, it had been granted and could not be revoked. Finally, the court of appeals agreed with the district court (*id.* at 29a-30a) that the legislation enacted by North Dakota is impermissible to the extent that it encumbers federal law providing for the acquisition of waterfowl habitat.

SUMMARY OF ARGUMENT

I

We agree with North Dakota that the courts below erred in holding that the United States need not obtain the consent of the governor of a state to federal acquisitions of waterfowl production areas within the state with moneys from the Migratory Bird Conservation Fund. We further submit, however, that the United States already has obtained the requisite gubernatorial consent in North Dakota and that such consent, once granted, may be neither revoked nor qualified, either gubernatorially or legislatively. In our view, the judgment of the court of appeals should be affirmed on this alternative ground.

A. There is no substance to North Dakota's threshold claim that even if the gubernatorial consents previously granted satisfy 16 U.S.C. 715k-5—and even if they are irrevocable—the United States already has acquired easements over more acreage than the previous governors approved and, therefore, the outstanding gubernatorial consents having been exhausted, they do not authorize the United States to acquire any additional easements in the State.

North Dakota bases this claim on the fact that, because of the peculiar nature of waterfowl production area country—typically characterized by numerous small, scattered and irregularly-shaped potholes—the Secretary has adopted the practice of acquiring easements covering all of the wetlands occurring on a given legal description. Because the easement *restrictions*, however, apply only to the wetlands occurring on each legal description (for a total of 764,522 acres), North Dakota's contention that the United States already has acquired more wetlands acreage than the gubernatorial consents encompass (1,517,437 acres) is without merit.

It is undisputed that between 1961 and 1977, the United States obtained gubernatorial consents, on a county-by-county basis for each of North Dakota's 41 counties, which set forth the maximum acreage of wetlands that could be acquired in each county. North Dakota now claims that these consents were not sufficiently specific to satisfy 16 U.S.C. 715k-5.

Neither the plain language of Section 715k-5 nor the legislative history suggests any such requirement of specificity as the State would import into the statute. In the absence of any evidence of such legislative intent, it would be improper to suppose Congress meant to impose on the state and federal governments, respectively, the considerable burdens of granting and obtaining individual approval of each easement that the United States might seek to acquire for use as a waterfowl production area.

Actual practice confirms this view. From immediately after the enactment of 16 U.S.C. 715k-5, both the Secretary and the governors of North Dakota have consistently interpreted the gubernatorial consent provision as requiring no more than county-by-county approvals setting forth the maximum wetlands acreage that may be acquired in each county.

B. The centerpiece of the State's argument is that even if valid gubernatorial consent to acquire wetlands in North Dakota once was granted to the federal government and has not been exhausted, that consent has effectively been revoked and is no longer operative. The question whether the consent required by 16 U.S.C. 715k-5, once validly granted, may be revoked is, of course, purely one of statutory construction.

Section 715k-5, which states that "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate

state agency," makes no provision for the revoking, qualifying or conditioning of an approval, once validly given. By its terms, all that the legislation requires is that the governor of a state or an appropriate state agency at some point have given consent to the United States' acquisition.

Nor is there anything in the legislative history of the Wetlands Loan Act of 1961 that suggests that Congress intended that gubernatorial consent, once granted, could be withdrawn prior to consummation of the acquisitions. Along with Congress' solicitousness for the concern of each state for the disposition of property located within its borders, which is manifested in the gubernatorial consent requirement of 16 U.S.C. 715k-5 itself, the legislative history also reveals Congress' recognition of the importance of the wetlands acquisition program as a whole. In authorizing a "crash program" (107 Cong. Rec. 12203 (1961) (remarks of Rep. Johnson)) involving the United States' acquisition of 4 1/2 million acres of wetlands, Congress must have assumed that the Secretary would be able to rely—at least for a reasonable period of time—on the continued effectiveness of gubernatorial consents. Such continued effectiveness is necessary to determine accurately the level of federal resources that should be concentrated in one area or another, to weigh carefully the relative merits of potential acquisitions to be purchased out of limited government funds, and to carry out the actual negotiations and bring them to fruition. It is also necessary to prevent delay in the acquisition process, which, in view of the rapid shrinkage and destruction of wetlands areas and the continued increase in the cost of acquiring the remaining wetlands, would likely result in the ultimate acquisition of fewer acres of wetlands. Both of Congress' concerns are given effect by a construction of 16 U.S.C. 715k-5 that permits each state to control the

disposition of property within its borders by withholding gubernatorial consent to acquire at the outset, but does not permit any state to jeopardize the effectiveness of the program as a whole by injecting into it the waste and uncertainty that revocations of consent would entail.

II

Our first argument establishes, we believe, that any attempt by the Governor to revoke outstanding consents would be ineffective. To the extent that the North Dakota statutes at issue purport to revoke gubernatorial consents previously given so far as they have not yet been exercised, we deem it obvious that the State legislature can no more accomplish this result than could the Governor. Nor has North Dakota merely attached reasonable conditions to the future exercise of acquisition rights previously obtained by the United States. Rather, as we show below, the legislation at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)) and therefore is invalid under the Supremacy Clause.

Migratory waterfowl have been the object of special protection afforded by a series of interrelated federal treaties and statutes for over 65 years. In view of this extensive federal regulatory program, the Court held in *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), that state law that is aberrant or hostile to the federal land acquisition scheme contemplated by the Migratory Bird Conservation Act of 1929, 16 U.S.C. (& Supp. IV) 715 *et seq.*, will not control. The Court's observation there (412 U.S. at 597)—that "[c]ertainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocab-

ly commit scarce funds"—is equally applicable to federal acquisitions of wetlands easements under the Duck Stamp Act, 16 U.S.C. 718d(c). Nor does the fact that in *Little Lake Misere Land Co.* the federal acquisition had been consummated prior to enactment of the state law at issue adequately distinguish that case from the present one. The same concerns for certainty and limited federal resources apply once gubernatorial consent to acquire has been obtained (see pages 14-15, *supra*). As we show below, several of the specific state statutes at issue here preclude "the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowitz*, *supra*, 312 U.S. at 67) with respect to the protection of migratory waterfowl.

ARGUMENT

I. The United States Has Obtained The Requisite Gubernatorial Consent To Its Acquisition Of Easements Over Lands Located In North Dakota For Use As Waterfowl Production Areas And That Consent Remains In Effect

As we suggested in our Motion to Affirm (at 8), we agree with the State (Br. 10-19) that the United States is required to obtain the consent of the governor or an appropriate state agency before acquiring waterfowl production areas with moneys from the Migratory Bird Conservation Fund. [11] We further submit, however, that

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[11] 16 U.S.C. 715k-5 plainly requires that "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency." In our view, the courts below erred in holding (J.S. App. 11a, 26a) that Section 715k-5 is part of the Migratory Bird Conservation Act of 1929, 16 U.S.C. (& Supp. IV) 715 *et seq.*, and, therefore, is inapplicable to the acquisition of waterfowl production areas by virtue of the exception from "the limitations and requirements of the Migratory Bird Conservation Act" provided

once the United States has obtained the requisite gubernatorial consent, it may acquire the lands concerning which consent was given notwithstanding any purported revocation or qualification of that consent.

So saying, we of course assume that substantial acreage covered by the gubernatorial consents already given remains unacquired. If it were otherwise, this litigation would be wholly academic since we do not contest the power of the state legislature to restrain or condition the governor's action in the future. We turn to that point immediately.

A. The United States Has Obtained The Requisite Gubernatorial Consent To Its Acquisition Of An Additional Approximately 750,000 Acres Of Wetlands In North Dakota For Use As Waterfowl Production Areas

North Dakota contends (Br. 20-22) that even if the gubernatorial consents that were granted satisfy 16 U.S.C. 715k-5—and even if they are irrevocable—the United States already has acquired easements over more acreage than the governors approved and, therefore, the outstanding gubernatorial consents having been exhausted, they do not authorize the United States to acquire any additional easements in the State. [12] This claim is without substance.

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in 16 U.S.C. 718d(c) (see page 5 & note 4, *supra*). In the first place, the gubernatorial consent requirement of 16 U.S.C. 715k-5 was not even in existence, as part of the Migratory Bird Conservation Act or otherwise, when the exception contained in 16 U.S.C. 718d(c) was enacted. Moreover, when 16 U.S.C. 715k-5 was enacted in 1961, it was enacted as Section 3 of the Wetlands Loan Act of 1961, Pub. L. No. 87-383, 75 Stat. 813, and it has never been codified as part of the Migratory Bird Conservation Act.

[12] But see former Governor Link's affidavit at J.A. 38-39, ¶ 5.

Largely because of the peculiar nature of waterfowl production area country—typically consisting of lands characterized by numerous small, scattered and irregularly-shaped potholes (see note 2, *supra*)—the Secretary has not attempted to acquire easements based on metes and bounds descriptions of the individual wetlands or potholes. Rather, he has adopted the practice of acquiring easements covering all of the wetlands occurring on a given described legal subdivision. [13] Thus, while the easement instrument *describes* a legal subdivision, the easement *restrictions* apply only to the wetlands occurring on that subdivision (see, *e.g.*, J.A. 14-16). [14]

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[13] We are advised by the Fish and Wildlife Service that since 1976, the location of the wetlands has been delineated on a map that is recorded along with the easement document (see J.A. 15).

[14] North Dakota suggests (Br. 21, 28-30) that the Secretary has attempted to restrict normal farming and ranching activities on upland areas within the legal descriptions contained in the easement instruments. These allegations are not supported by the record in this case, are not at issue here and, in fact, are unfounded. As the easement documents themselves provide (see J.A. 15-16), a landowner remains free to conduct on the uplands farming practices and any other activities so long as those activities are not inconsistent with the easement restrictions. See 2 G. Thompson, *Commentaries on the Modern Law of Real Property* § 427 at 859 ("[a]ny incident of ownership not inconsistent with the easement and the enjoyment of the same is reserved to the grantor"), § 431 (Repl. 1980). Indeed, the easement document permits the landowner to farm even the wetlands when they "are dry of natural causes" (J.A. 15-16).

Furthermore, contrary to the State's intimation (Br. 29 n.44), the Secretary has not taken the position that the regulations governing the National Wildlife Refuge System, 50 C.F.R. Subchapter C, apply to uplands areas. Indeed, in the view of the Secretary, only those portions of 50 C.F.R. Subchapter C that prohibit activities that already are restricted by the easement document (Part 25, Subparts A and D; 27.11, 27.51, 27.61, 27.84, 27.92, 27.94(a), 27.95(a), 28.11,

Indeed, because the easement restrictions protect only the wetlands areas, the parties from the outset expressed gubernatorial consent in terms of the pertinent standard of measurement, *viz.*, "acres of wetlands" (J.A. 3).

Hence, while the total gross area described in the easement documents is 4,788,300 acres (J.A. 49), because the easement restrictions apply only to the wetlands acres North Dakota's contention that the United States already has acquired more acreage than the gubernatorial approvals encompass is without merit. By contrast, since the United States obtained gubernatorial consent to acquire easements over 1,517,437 acres of wetlands (J.A. 3-5) and has only acquired easements over 764,522 wetlands acres (J.A. 49), it is entitled to acquire an additional 752,915 acres of wetlands easements.

It is undisputed that between 1961 and 1977, the Secretary requested and received the consent of the Governor of North Dakota, or his Game and Fish Commissioner, to acquire easements covering 1,517,437 acres of wetlands

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28.21, 28.31, 28.32(a); and Part 29, Subpart B (except for those provisions that by their terms are irrelevant)) apply even to the extent of the interest granted in the wetlands themselves. See the Secretary's answer to interrogatory 42(a) filed in *Towner County Water District* v. *Key, pending*, Civ. No. A2-81-178 (D.N.D., filed Nov. 17, 1981).

In making these contentions, the State may be relying on the Secretary's answers to interrogatories 25-32 in *Towner County Water District* v. *Key, supra*. There, the Secretary stated that entire tracts "are either real or personal property of the United States or part of the National Wildlife Refuge System." Those answers are concededly ambiguous, and were intended to mean only that the United States has a right-of-access for inspection purposes over the entire tract to the wetlands over which the easement restrictions apply (see J.A. 14).

located in North Dakota (J.A. 3-5). These consents were given on a county-by-county basis for each of North Dakota's 41 counties and set forth the maximum acreage of wetlands over which easements could be acquired in each county (J.A. 3-5, 47-48). Nevertheless, North Dakota now argues (Br. 19-20) that these consents were not sufficiently specific to satisfy the requirements of 16 U.S.C. 715k-5. There is no merit to this claim.

The plain language of 16 U.S.C. 715k-5 contains no such requirement of specificity as North Dakota would import into the statute. Section 715k-5 merely provides, in relevant part, that "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency," without requiring any particular level of specificity of the approval.

Nor does the legislative history suggest that Section 715k-5 was intended to require more. North Dakota relies on the remark of Senator Magnuson (107 Cong. Rec. 17171 (1961)) that the federal government and the state must agree "as to the nature of the lands and the acreage involved." But even if this legislative history can be read as imparting a gloss to the otherwise plain statutory language, Senator Magnuson's conditions are fully met here. Each consent specifies the nature of the lands involved, *i.e.*, "wetlands," and the amount of acreage, acquisition of which was approved (see, *e.g.*, J.A. 3). [15] In the absence of any evidence of such a legislative intent, it

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[15] The only authority offered by the State in support of its "specificity" argument is the Fifth Circuit's decision in *Swan Lake Hunting Club* v. *United States*, 381 F.2d 238 (5th Cir. 1967), which, in turn, also relied on this same comment by Senator Magnuson (*id.* at 243). But the Fifth Circuit's suggestion in that case (*ibid.*) that 16 U.S.C. 715k-5 requires gubernatorial consent as to each specific tract was

would be improper to suppose Congress meant to impose on the state and federal governments, respectively, the considerable burdens of granting and obtaining individual approval of each easement that the United States might seek to acquire for use as a waterfowl production area.

Actual practice confirms our view. From immediately after the enactment of 16 U.S.C. 715k-5, the Secretary (as well as the governors of North Dakota)[16] consistently has interpreted the gubernatorial consent provision as requiring no more than county-by-county approvals setting forth the maximum wetlands acreage that may be acquired in each county (J.A. 3-5). Such a contemporaneous and longstanding construction of a statute by the federal officer charged with its administration will not be set aside absent a compelling showing that it is wrong. See, *e.g.*, *E.I. DuPont De Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). No such showing has been made here. Moreover, since no North Dakota governor has ever purported to consent to the acquisition of wetlands easements on an individual basis (see N.D. Br. 20),

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merely dictum, since the governor there already had given his approval for the acquisition of lands specifically depicted on a map (381 F.2d at 244). Hence, there was no need for the court in *Swan Lake* to consider whether a less specific approval also would have satisfied Section 715k-5.

[16] We note that each of the consents at issue here was expressly granted by the respective Governors or Game and Fish Commissioner "in accordance with the provisions of the Act of October 4, 1961, 75 Stat. 813 [16 U.S.C. 715k-3 to 715k-5]" (see, *e.g.*, J.A. 3). In addition, while Governor Guy gave consent to the United States' acquisition of easements up to a maximum amount of wetlands acreage in each county, he retained the right to consent individually to each fee acquisition (J.A. 54).

now to discover such a requirement would cast doubt on the more than 11,000 such easements already obtained from willing sellers in North Dakota alone (see J.A. 48).

B. Gubernatorial Consent To The United States' Acquisition Of Waterfowl Production Areas, Once Given, Cannot Be Revoked

The centerpiece of the State's argument (Br. 22-33) is that, even if valid consent to acquire wetlands in North Dakota once was granted to the federal government, and has not yet been exhausted, that consent has effectively been revoked and is no longer operative. [17] North Dakota, however, has offered nothing to show that 16 U.S.C. 715k-5 was intended to permit the governor of a state to revoke a valid consent, once given. Neither the State's purported analogies to revocation of consent in other areas of the law (Br. 22-26) [18] nor its own policy reasons for

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[17] It is not clear whether the State is treating the prior consents as withdrawn by later gubernatorial or legislative action. See discussion, *infra*, page 30. Our response is the same in any case.

[18] The right of a criminal defendant prospectively to revoke his waiver of a constitutional right (see cases cited at N.D. Br. 23) is surely inapposite to the present case, in which the State seeks to revoke its consent to the United States' acquisition of lands in North Dakota, which consent is not required as a constitutional matter and would not even be necessary were it not for 16 U.S.C. 715k-5 (see pages 28-29, *infra*). Moreover, none of the decisions relied on by appellant (Br. 23-26) is authority for a rule that the duly authorized actions of government officials may not have a binding effect upon their successors in office. Indeed, in *West* v. *Standard Oil Co.*, 278 U.S. 200 (1929), relied on by North Dakota (Br. 26), this Court specifically acknowledged (278 U.S. at 211-213, 218-219) that a legislature may authorize an officer to dispose of government property, and that once that officer has acted in compliance with the procedures established by law, his actions may not subsequently be reversed by his successors in office. Similarly, in *Wilbur* v. *United States*, 281

desiring to revoke (Br. 27-33)[19] bear the slightest relevance to what is purely a question of statutory construction: whether Congress intended that the gubernatorial consent to the United States' acquiring lands for use as waterfowl production areas required by 16 U.S.C. 715k-5, once validly given, could be revoked prior to consummation of the consented-to acquisition.

1. As with any case involving the interpretation of an Act of Congress, "we begin with the language of the statute itself." *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11, 16 (1979). Accord, *e.g.*, *Haig* v. *Agee*, 453 U.S. 280, 290 (1981); *Howe* v. *Smith*, 452 U.S. 473, 480 (1981); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979). The proviso to 16 U.S.C. 715k-5 with which we are concerned provides simply that "[n]o land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof *has been approved* by the Governor of the State or appropriate State agency" (emphasis added). The statute thus makes no provision for the revoking, qualifying or conditioning of an approval, once validly given. By its terms, all that the legislation

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U.S. 206 (1930), also relied upon by the State (Br. 25-26), the Court recognized (281 U.S. at 217-218) that an action taken by an authorized government official will be conclusive if the statute at issue contemplates that such action shall exhaust or terminate the exertion of administrative authority.

[19] While we do not agree with the State's characterization of its several other disputes with the Secretary (N.D. Br. 27-33), we do not respond on the merits here because those separate controversies are not before the Court in this case. We merely note that those disputes arose after the enactment of the Wetlands Loan Act in 1961 and could not have provided the impetus for the gubernatorial consent requirement of 16 U.S.C. 715k-5. Accordingly, these other disagreements have no bearing on the only relevant inquiry—that of congressional intent.

requires is that the governor or state agency at some point have given consent to the United States' acquisition. Congress did not condition the United States' right to acquire on gubernatorial approval that was given *and was not revoked*. Rather, under the statute, the granting of approval is in itself a legally significant act. Once a governor or state agency has taken that action, the role assigned to the state by Congress has been exhausted. See *Swan Lake Hunting Club* v. *United States*, *supra*, 381 F.2d at 244-245. [20]

2. There is nothing in the legislative history of the 1961 Act that suggests that Congress intended that gubernatorial consent, once granted, could be withdrawn

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[20] North Dakota asserts (Br. 26-27 n.39) that the approvals given by former Governor Guy were not intended to be irrevocable. The consents themselves, of course, do not state they are revocable (see J.A. 3). The State therefore relies instead upon an affidavit by Governor Guy stating (J.A. 56) that the consents that he granted while in office were intended to be effective only until "modified or rescinded" by him and that he never intended to bind his successors in office. These representations, however, were not made until after the commencement of this litigation; the record contains no indication that Governor Guy had made these views known to the Secretary at the time he granted the apparently unconditional approvals 10-18 years previously. See *Swan Lake Hunting Club*, *supra*, 381 F.2d at 244-245.

The State attempts to distinguish *Swan Lake* on the ground that in that case the purported revocation of a prior consent was not attempted until after the acquisition at issue already had been completed. We agree there is no doubt that once a consented-to acquisition has been consummated, the consent may not thereafter be withdrawn. We nevertheless note that the court in *Swan Lake* gave no indication that its conclusion that a consent, validly given pursuant to 16 U.S.C. 715k-5, could not be revoked, was based on the ground that the acquisition in that case had been consummated prior to the attempted revocation.

prior to consummation of the acquisition.[21] To be sure, it is clear that the obtaining of gubernatorial consent was intended to be a prerequisite to acquisitions made out of the Migratory Bird Conservation Fund. See H.R. Conf. Rep. No. 1184, 87th Cong., 1st Sess. 3 (1961); 107 Cong. Rec. 17171 (1961) (remarks of Sen. Magnuson). But the notion that the Fish and Wildlife Service, once having obtained such consent, cannot rely on it—at least for a reasonable period of time—in planning acquistion strategies, estimating funding needs, allocating resources and negotiating with willing sellers, runs counter to Congress' express recognition of the importance of the wetlands acquisition program, its long-term goals and the urgency and meticulousness of planning required to attain those objectives.

A national and international undertaking of the magnitude of the migratory bird conservation effort that is embodied in the federal laws and treaties (see Part II(A), *infra*) cannot be carried out over an extended period of time without at least some degree of certainty concerning which lands, and how much land, in which geographical areas, are available for acquisition and incorporation into the program. Specifically, in 1961 Congress was advised that in order for the Nation "to be successful in its objective of preserving sufficient habitat to sustain [its] migratory waterfowl," not less than 12 1/2 million acres of wetlands "distributed throughout nesting, migration, and wintering areas used by ducks and geese," would have to be under public control in the 48 contiguous

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[21] The proviso to 16 U.S.C. 715k-5 was added by the Senate Committee on Commerce (see S. Rep. No. 705, *supra*, at 3) and acceded to by the House of Representatives (see H.R. Conf. Rep. No. 1184, 87th Cong., 1st Sess. 3 (1961)), both without explanation.

states. S.Rep. No. 705, *supra*, at 2, 4. Of these 12 1/2 million acres, 4 1/2 million acres were still to be acquired by the United States. *Ibid.*[22]

In view of the breadth of the program contemplated by the Wetlands Loan Act of 1961, Congress must have assumed that the Secretary would be able to rely on the continued effectiveness—at least for a reasonable period of time—of gubernatorial consents, once obtained. That is necessary to determine accurately the level of federal resources, both money and personnel, that should be concentrated in one area or another, to weigh carefully the relative merits of potential acquisitions that would have to be purchased out of limited federal funds, and to carry out the actual negotiations and bring them to fruition. Otherwise—if state governors were free to grant approvals and then promptly to withdraw them, the Secretary would be forced to purchase immediately any land, or interest in land, acquisition of which had been approved by a governor. Moreover, where large numbers of acquisitions were at stake, unless the Secretary could obtain consent and count on its continued effectiveness, federal resources would be wasted in the negotiation of acquisitions, consummation of which could ultimately be frustrated by a gubernatorial veto. The court of appeals thus correctly noted (J.S. App. 27a) that "[t]o permit revocation would inject intolerable uncertainty into conservation planning and policy. It would subject every acquisition to the whim of changing state governments."

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[22] In 1961, 5 1/2 million acres already were under public ownership; 3 1/2 million acres were under the control of Interior's Fish and Wildlife Service and 2 million acres were controlled by the states. It was projected that the United States would acquire 4 1/2 of the remaining seven million acres and the states would acquire 2 1/2 million additional acres. S. Rep. No. 705, *supra*, at 2.

The congressionally recognized (see H.R. Rep. No. 545, *supra*, at 3; S.Rep. No. 705, *supra*, at 4) urgency of the need for wetlands acquisition also suggests that Congress did not intend that gubernatorial consent, once granted, could be revoked. Permitting state governors to revoke their approval would seriously delay the acquisition program since, in each case of revocation, the planning and negotiation processes must begin again. Indeed, in view of the rapid shrinkage and destruction of wetlands areas and the continued increase in the cost of acquiring the remaining lands (of which Congress was well aware; see *ibid.*), permitting revocation would likely result in the ultimate acquisition of fewer acres of wetlands.

We do not contend that by the Wetlands Loan Act of 1961 Congress was calling for federal acquisition of waterfowl production areas at the expense of any consideration for the rights of the states. To the contrary, Congress expressly gave the states (through their governors) a veto over federal acquisition of any land, or interests in any land, within their borders. In construing Section 715k-5, however, that congressional solicitousness for the concerns of the states must be considered together with Congress' frequent recognition of the importance of the acquisition program as a whole. Both congressional concerns are given effect by a construction of 16 U.S.C. 715k-5 that permits each state to control the disposition of property within its borders by withholding gubernatorial consent to acquire at the outset, but does not permit any state to jeopardize the effectiveness of the program as a whole by injecting into it the waste and uncertainty that revocation of consent would entail.

To be sure, notwithstanding these concerns, Congress may not have intended that gubernatorial consent under 16 U.S.C. 715k-5 would remain effective for an unreasonably long period of time. But that is not this

case. Here, over the period 1961-1977, gubernatorial consents were granted with respect to the acquisition of easements covering approximately 1,517,437 acres of wetlands. During that 17-year period, the United States purchased from willing landowners 11,685 easements covering a total of 764,522 wetlands acres (J.A. 48-49).[22] This, then, is not a case in which the United States has obtained the requisite gubernatorial consent, which it then holds in abeyance indefinitely. Rather, this case represents precisely the type of longterm planning and timing that Congress must have contemplated when it authorized a program of the magnitude of the Wetlands Loan Act of 1961.

3. Finally, to the extent statutory language is ambiguous and resort to legislative history does not decisively remove the ambiguity, it is appropriate to rely on "generalized axioms of experience in construing legislation." *United States* v. *Universal C.I.T. Corp.*, 344 U.S. 218, 222 (1952). Here, the applicable rule of statutory construction is that, while Congress may elect to condition the performance of a federal activity within a state upon that state's consent, such limitations are not favored and will be construed narrowly. Cf. *EPA* v. *State Water Resources Control Board*, 426 U.S. 200, 211 (1976) (emphasis added) ("[f]ederal installations are subject to state regulation only when *and to the extent* congressional authorization is clear and unambiguous"); *Hancock* v. *Train*, 426 U.S. 167, 179 (1976).

"The power of the Federal Government to acquire land within a State by purchase or by condemnation without

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[22] As noted above (see page 11, *supra*), since 1977 the federal acquisition program in North Dakota has come to a standstill due to the uncertainty concerning a landowner's ability to convey a permanent easement engendered by the state legislation.

the consent of the State is well established." *Paul* v. *United States*, 371 U.S. 245, 264 (1963); *Kohl* v. *United States*, 91 U.S. 367, 371 (1875).[24] Thus, were it not for the concluding proviso of 16 U.S.C. 715k-5, North Dakota would have no right to prevent the private sale of land or interests in land located within its borders to the United States. See *Swan Lake Hunting Club* v. *United States*, *supra*, 381 F.2d at 242-243. Accordingly, since, as we have shown above, there is no "clear and unambiguous" congressional intent that state governors have the power not only to approve or disapprove United States' acquisitions of wetlands located within their borders, but also to revoke such approval, once given, 16 U.S.C. 715k-5's requirement of gubernatorial consent should be narrowly interpreted, so as to prohibit such revocation of validly granted consent.

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[24] Without the consent of the state, however, the United States' possession is simply that of an ordinary proprietor; it does not obtain exclusive jurisdiction of the area purchased under Article I, Section 8, Clause 17 of the Constitution. *Paul* v. *United States*, 371 U.S. 245, 264 (1963); *Kohl* v. *United States*, 91 U.S. 367, 374 (1875).

North Dakota mistakenly relies (Br. 39) on *United States* v. *Burnison*, 339 U.S. 87 (1950), to assert that state law can prevent a state's citizens from conveying land to the federal government. *Burnison*, however, like *United States* v. *Fox*, 94 U.S. 315 (1876), which *Burnison* reaffirmed, held only that because part of the sovereignty retained by the states under the Tenth Amendment is the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries, a state may deny a *testator* the right to *will* property to the United States. By contrast, in both *Fox* and *Burnison*, the Court cautioned that its decision did not affect the right of the United States to acquire property from private citizens by purchase or eminent domain. *United States* v. *Burnison*, *supra*, 339 U.S. at 93 n.14; *United States* v. *Fox*, *supra*, 94 U.S. at 320.

II. N.D. Cent. Code §§ 47-05-02.1(2), 20.1-02-18.1, 20.1-02-18.2 And 20.1-02.18.3, As Applied Here, Impermissibly Revoke, Limit Or Qualify Previously Given Gubernatorial Consent To Acquisitions By The United States In Derogation Of Federal Law And Therefore Violate The Supremacy Clause

The submission just concluded establishes, we believe, that, as a matter of governing federal law, North Dakota could not effectively revoke express consent previously given by its governors to the United States to acquire easements covering specified quantities of wetlands acreage. As we read the declaration of Governor Link in April 1979, he did not purport to withdraw any earlier consent, but merely announced his intention to grant nothing more in the future. See J.A. 25. If that is right, Governor Link's declaration is unobjectionable. On the other hand, any attempt by the Governor to revoke outstanding consents would be ineffective under our argument. It remains, however, to consider North Dakota's recent *legislative* action insofar as it affects previous gubernatorial consents to acquisition of wetlands easements.

It is plain that at least some of the North Dakota statutes at issue *do* purport to limit or qualify the gubernatorial consents previously given so far as they have not yet been exercised. To the extent that this State legislation works a partial revocation of earlier gubernatorial consent, we deem it obvious the State legislature can no more accomplish this result than could the Governor. But it is suggested North Dakota has merely attached reasonable conditions to the future exercise of the acquisition rights previously obtained by the United States. That presents a somewhat different question, to which we now turn.

As we see it, the issue is whether N.D. Cent. Code §§ 47-05-02.1(2), 20.1-02-18.1, 20.1-02-18.2 (Repl. 1978),

and 20.1-02-18.3 (Interim Supp. (Pt. 1) 1981), as applied to unexercised but already given consent to acquire wetlands easements, pose substantial barriers to the effectuation of the longstanding congressional objective of preserving migratory waterfowl. If so, those provisions must fall, since any enactment that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is invalid under the Supremacy Clause. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). See also, *e.g.*, *Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 240 (1967).

A. As noted above (note 1, *supra*), the Secretary of the Interior has been charged since 1900 with the duties of preserving, distributing, introducing and restoring game birds and other wild birds. 16 U.S.C. 701. In particular, migratory waterfowl have been protected by treaty and federal statute for over 65 years.

On December 8, 1916, President Wilson proclaimed a treaty with Great Britain (on behalf of Canada) for the protection of the "[m]any species of birds [including waterfowl] [that,] in the course of their annual migration[,] traverse certain parts of the United States and the Dominion of Canada, and * * * are * * * in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds" (Convention for the Protection of Migratory Birds, Aug. 16, 1916, 39 Stat. 1702).[*] In 1918, Congress passed the Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*, the stated purpose of which was to implement the treaty between the United States and

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[*] Subsequent treaties have been signed with other nations to afford migratory birds similar protection. See note 1, *supra*.

Great Britain. 40 Stat. 755.[26] The Act generally proscribes, subject to regulations promulgated by the Secretary, the hunting, capture, possession or sale of migratory birds. See 16 U.S.C. (& Supp. IV) 703 *et seq.*

In 1929, Congress enacted the Migratory Bird Conservation Act, 16 U.S.C. (& Supp. IV) 715 *et seq.*, which authorizes the Secretary to purchase or rent any area of land or water or any interest in any such area "for use as an inviolate sanctuary * * * for migratory birds," where such purchase or rental has been approved by the Migratory Bird Conservation Commission established by the Act (16 U.S.C. 715a; 16 U.S.C. (& Supp. IV) 715d; see also notes 3 & 4, *supra*).[27] As the court of appeals noted (J.S. App. 21a; emphasis added), "[t]ogether, the Treaty Act—in regulating hunting and possession—and the Conservation Act—by establishing sanctuaries and preserving natural waterfowl habitat—help implement our *national commitment to the protection of migratory birds.*"

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[26] The Act has since been amended to implement as well this Nation's treaties with Mexico, Japan and the Soviet Union (see note 1, *supra*). See 16 U.S.C. 703; 16 U.S.C. (Supp. IV) 715j. See also 16 U.S.C. (Supp. IV) 712(2).

[27] The Conservation Act also was passed for the express purpose of meeting the Nation's treaty obligations with Great Britain "by lessening the dangers threatening migratory game birds from drainage and other causes, by the acquisition of areas of land and of water to furnish in perpetuity reservations for the adequate protection of such birds; and authorizing appropriations for the establishment of such areas, their maintenance and improvement, and for other purposes." 45 Stat. 1222. The current Act provides (16 U.S.C. (& Supp. IV) 715i(a)) that acquired lands "shall * * * be administered by the Secretary of the Interior under rules and regulations prescribed by him to conserve and protect migratory birds in accordance with treaty obligations with Mexico, Canada, Japan, and the Union of Soviet Socialist Republics * * *."

Subsequently, Congress supplemented this protective body of law by enactment of the Migratory Bird Hunting Stamp Act of 1934, 16 U.S.C. (& Supp. IV) 718 *et seq.*, the 1958 amendment to it, and the Wetlands Loan Act of 1961 and the 1967 and 1976 extensions of it, all of which are discussed more fully above (pages 4-6, *supra*).

B. In upholding the Migratory Bird Treaty Act against a challenge under the Tenth Amendment by Missouri in 1920, this Court, through Justice Holmes, characterized the national effort to protect migratory birds in language that is even more apt today (*Missouri* v. *Holland*, 252 U.S. 416, 435 (emphasis added)):

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. *But for the treaty and the statute there soon might be no birds for any powers to deal with.*

More recently, the Court made clear that state law which is aberrant or hostile to the federal land acquisition scheme contemplated by the Migratory Bird Conservation Act will not control. *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580 (1973), involved the United States' acquisition, under the Conservation Act, of lands, the mineral rights to which were reserved to the grantors for a 10-year period (subject to extension if certain conditions regarding exploration and production were met), after which such rights were to vest in the United States. The question presented was whether, following the expiration of the 10-year period without the conditions for extension having been met, a Louisiana statute (Act 315 of 1940) enacted after the United States had acquired the land in question and providing that mineral rights reserved in land conveyances to the

United States shall be "imprescriptible" could constitutionally be applied to defeat the government's right to the minerals.

Recognizing (412 U.S. at 592) that a land acquisition by the United States under the Migratory Bird Conservation Act "is one arising from and bearing heavily upon a federal regulatory program," the Court held (*ibid.*) that "the choice-of-law task is a federal task for federal courts * * *." In turn, the Court held (*id.* at 604) that "[s]ince Act 315 is plainly not in accord with the federal program implemented by the * * * land acquisitions [at issue], state law is not a permissible choice here." The Court made clear the reasons why it regarded state law as hostile to the federal land acquisition program (*id.* at 597; emphasis added):

> To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act *and indeed all other federal land acquisition programs.* These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. *Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds.*

Accordingly, the Court concluded (*id.* at 604) that "[t]he choice of law merges with the constitutional demands of controlling federal legislation; we turn away from state law by default."

This analysis is equally applicable to federal acquisitions under the Duck Stamp Act, 16 U.S.C. 718d(c), as the Court suggested in *Little Lake Misere*, *supra*, 412 U.S. at 597, and as the Eighth Circuit previously held in

United States v. *Albrecht*, 496 F.2d 906 (1974). In *Albrecht*, the owners of land over which the United States had obtained an easement under 16 U.S.C. 718d(c) attempted to defend against an action by the United States for violation of the terms of the easement on the ground that state law did not recognize the type of easement that the United States purported to hold. Without deciding whether or not state law would permit the conveyance at issue, the court held (496 F.2d at 911) that "the specific federal governmental interest in acquiring rights to property for waterfowl production areas is stronger than any possible 'aberrant' or 'hostile' [State] law that would preclude the conveyance granted in this case. * * * [T]he reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right."

To be sure, the present case is one step removed from the facts of *Little Lake Misere Land Co.*, *supra*, in which the federal acquisition had been consummated prior to the enactment of the "aberrant or hostile" state law. Nevertheless, the same concerns for certainty and limited federal resources apply here, where the requisite gubernatorial consent to acquire already has been obtained.[28] Once such consent is obtained, there begins

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[28] North Dakota's principal objection (Br. 33-37) to our Supremacy Clause argument is that state law cannot be preempted when the federal program has specifically assigned to the state a role to play in the federal program: here, the right of the governor of a State to prohibit federal acquisition of any land within it. As we have shown above (see Part I(B), *supra*), however, a state's role under the waterfowl production area acquisition program is exhausted once the governor has given his consent to federal acquisition, as the gov-

the "acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations" that the Court recognized in *Little Lake Misere Land Co.*, *supra*, 412 U.S. at 597. If state rules hostile to federal acquisition may be interposed subsequent to the obtaining of consent prior to consummation of the acquisition, while no actual acquisition will have been lost or its worth devalued (compare 412 U.S. at 597), limited federal resources will have been wasted in the pursuit of unattainable or, even if available, no longer worthwhile properties. We turn, therefore, to an analysis of whether the specific North Dakota statutes at issue here preclude "the accomplishment and execution of the full purposes and objectives of Congress" (*Hines* v. *Davidowtiz*, *supra*, 312 U.S. at 67) with respect to the protection of migratory waterfowl.

C. As we discussed above (pages 8-9, 17-19, *supra*) the United States already has obtained gubernatorial consent to its acquisition of sufficient wetlands acreage in North Dakota to satisfy its acquisition objectives in that state. Accordingly, we are concerned here only with the effect of the state legislation on previously approved, but not yet consummated, federal wetlands acquisitions. We

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ernors of North Dakota did here. Accordingly, once such consent has been given, federal law should control. See *United States* v. *Little Lake Misere Land Co.*, *supra*; *United States* v. *Albrecht*, *supra*. Indeed, in *Little Lake Misere* itself, state legislative consent was required under 16 U.S.C. 715f of the Migratory Bird Conservation Act. (We acknowledge that if, contrary to our submission above (Part I(B), *supra*), gubernatorial consent were not irrevocable there would be no basis on which to hold the North Dakota statutes at issue here invalid under the Supremacy Clause since, at least as a matter of federal law, if the governor can revoke his consent, so too can the State legislature retroactively condition that consent, as North Dakota apparently has attempted to do here.)

are not challenging the validity, under the Supremacy Clause, of the state legislation as it is applied to acquisitions to which the Governor had not consented prior to the effective date of the state statutes.

1. N.D. Cent. Code § 47-05-02.1(2) (Repl. 1978) (J.S. App. 5a-6a) purports to limit all easements covering land located in North Dakota and acquired after July 1, 1977, to a maximum duration of 99 years, regardless of a grantor's willingness to convey a perpetual easement or, indeed, a statement in the easement instrument to the effect that the grant is in perpetuity. Notwithstanding North Dakota's assertion (Br. 37) that "[t]he record is totally devoid of any reason why a 99-year easement limit should be unconstitutional," the hostile impact on the United States' waterfowl production area acquisition program of this statute is apparent on its face: application of the statute to the United States' acquisition of waterfowl production areas would undermine the long-range objective of the federal program to provide for the conservation of wildlife not just for today and tomorrow, but for the generations to come. Moreover, North Dakota's observation (Br. 38) that "[u]ntil 1962, the Secretary had not been buying perpetual easements" is inapposite.[29] Since soon after commencement of the wetlands loan program in 1961, the form easement employed by the Secretary has granted a perpetual easement. See J.S.

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[29] Further, in the same dialogue between Representative Dingell and Interior Bureau of Sport Fisheries and Wildlife Director Janzen on which North Dakota relies (Br. 38-39 n.49), Mr. Janzen also stated: "Our instructions are to take leases for as long as possible." *Authorize Increased Payments to Counties for Wildlife Refuges: Hearings on H.R. 10714, H.R. 11525, H.R. 11535, H.R. 12143, and H.R. 12144 (H.R. 12145) Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 2d Sess. 86 (1962).

App. 7a; J.A. 14. Indeed, the State itself has admitted that the majority of the wetlands easements the United States has acquired in North Dakota are perpetual easements. N.D. Br. 32; J.A. 31 (¶ 9), 64 (¶ 9). See also *Migratory Waterfowl Conservation and Wolf Creek, Ky., Fish Hatchery: Hearings on H.R. 354, H.R. 480, H.R. 4216, H.R. 8348, H.R. 481, H.R. 1019, H.R. 3538, H.R. 5768, H.R. 482, H.R. 490 and H.R. 497 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. 53-54 (1967).

2. N.D. Cent. Code § 20.1-02-18.1 (Repl. 1978) (J.S. App. 2a-4a) directs the Governor to refer requests from the Secretary for land acquisition approvals to the board of commissioners of the county in which the land sought to be acquired is located. The commissioners then are required to inspect the proposed acquisition areas and solicit comments from the public on the proposal. The Governor may not approve an acquisition until he receives an affirmative recommendation from the commissioners. The statute also requires the Secretary to submit a detailed impact analysis with the acquisition proposal and directs the county agent to prepare another impact analysis for the board of commissioners' consideration. The expense of both reports is to be borne by the Secretary.

It is unclear whether this provision was intended to apply to acquisitions of land that had been approved by the Governor prior to enactment of the statute. To the extent that it does, however, it is hostile to the federal program since, although the United States already has obtained the only federal prerequisite to acquisition—gubernatorial consent—N.D. Cent. Code § 20.1-02-18.1 (Repl. 1978) would require it to obtain a second consent in accordance with the burdensome procedures mandated by that Section. And, of course, whenever the second

consent is withheld, the effect is to cancel the right of acquisition already obtained.

At all events, the North Dakota statute seriously burdens the easement acquisition program. Entailed in obtaining the second consent would be, *inter alia*, the expense to the Secretary of preparing his own impact analysis, paying for the county's impact analysis, and participating in the public hearings. Moreover, such procedures would have the inevitable effect of delaying the federal acquisitions, while the amount of available wetlands continues to shrink and their price continues to rise.[30] In view of the fact that the Secretary was required to obtain 11,685 individual easements in order to acquire 764,522 acres of wetlands (J.A. 48-49), it may be presumed that he would have to obtain approximately 3,500 more individual easements in order to acquire the additional 224,613 wetlands acres necessary to fulfill his wetlands easements acquisition goals for North Dakota (see note 9, *supra*). The expense and delay incident to the application of the procedures mandated by Section 20.1-02-18.1 to approximately 3,500 individual easements would so reduce the federal resources available for acquisitions as to detract substantially from the full effectuation of Congress' objective of preserving the wetlands for waterfowl breeding and nesting.

3. As we noted in our Motion to Affirm (at 10-11 n.5), we do not quarrel with N.D. Cent. Code § 20.1-02-18.2(1) (Repl. 1978) (J.S. App. 4a), as amended (see note 10, *supra*). That provision, which merely permits a landowner to "[n]egotiate the time period of the lease, easement, or servitude being sought," does not conflict with federal

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[30] Section 20.1-02-18.1 provides 60 days just for the county commissioners to make their recommendation to the Governor.

statutory law or policy and therefore can constitutionally be applied to acquisitions that have already been approved, since it affords the landowner no rights that he would not have had in the absence of the legislation. For the same reason, the first half of N.D. Cent. Code § 20.1-02-18.2(2) (Repl. 1978) (J.S. App. 4a), which permits a landowner to "[r]estrict a lease, easement, or servitude by legal description to the land, wetland, or water areas being sought * * *" is not objectionable.

In our view, however, the remaining portion of Section 20.1-02-18.2 (J.S. App. 4a-5a), as applied to previously approved acquisitions, is invalid under the Supremacy Clause. Because of the inherently fluctuating nature of wetlands the Secretary's standard easement form provides (J.A. 15) "that the lands covered by this conveyance shall include any enlargements of said wetland areas resulting from normal or abnormal increased water." We agree, of course, that a landowner could refuse to make a given conveyance to the Secretary unless such language were omitted from the easement document. However, the second half of N.D. Cent. Code § 20.1-02-18.2(2) (Repl. 1978) (J.S. App. 4a), which permits a landowner to "drain any after-expanded wetland or water area in excess of the legal description in the lease, easement, or servitude," together with the concluding language of § 20.1-02-18.2 (J.S. App. 5a), which provides that the failure of the Secretary to agree to these conditions will nullify North Dakota's consent to federal acquistions under the Migratory Bird Conservation Act, may be construed as permitting drainage of after-expanded wetlands notwithstanding provisions to the contrary contained in the easement agreement itself.[31] Such a con-

[31] The more plausible reading of the provisions, we submit, is that they, like the first half of N.D. Cent. Code § 20.1-02-18.2 (Repl.

struction would surely defeat full effectuation of the federal wetlands acquisition program, since expanded wetlands constitute a significant part of the waterfowl's habitat and breeding areas.

4. Finally, to the extent N.D. Cent. Code § 20.1-02-18.3 (Interim Supp. (Pt. 1) 1981) (J.S. App. 5a), which suspends federal acquisitions of "migratory bird reservations," applies only to the acquisition of inviolate sanctuaries under the Migratory Bird Conservation Act of 1929, 16 U.S.C. (& Supp. IV) 715 *et seq.*, as North Dakota construes the provision (Br. 41), the question is not properly before the Court, because this case involves only the acquistion of waterfowl production areas, under the Duck Stamp Act and the Wetlands Loan Act.[32] But, of course, we would challenge the provision to the extent that the statute's suspension of gubernatorial consent to acquisitions of land or interests in land with moneys from the Migratory Bird Conservation Fund purports to apply to acquisitions of waterfowl production areas, consent to which already has been obtained. Because such consent cannot be revoked (see Part I (B)), the suspension of

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1978), simply recognize the landowner's right to negotiate the terms of the easement. As noted above, so construed the statute would pose no Supremacy Clause problems.

[32] For the same reason, this Court need not consider the validity of N.D. Cent. Code § 20.1-02.18 (Repl. 1978) (J.S. App. 2a), which purports to qualify North Dakota's previous unconditional legislative consent to the United States' acquisition of lands in North Dakota for migratory bird sanctuaries, pursuant to the Migratory Bird Conservation Act of 1929, 16 U.S.C. (& Supp. IV) 715 *et seq.* In any event, even if gubernatorial consent under 16 U.S.C. 715k-5 may be revoked, it does not follow that 16 U.S.C. 715f, a wholly different statute, with its own legislative history, would be similarly construed.

consent provision is, on its face, hostile to the acquisition program and, therefore, invalid under the Supremacy Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed, with the modifications suggested above.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

BARBARA E. ETKIND
Assistant to the Solicitor General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

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On Appeal from the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR THE STATE OF NORTH DAKOTA

ROBERT O. WEFALD
Attorney General
MURRAY G. SAGSVEEN
Special Assistant Attorney General
ZUGER & BUCKLIN
P.O. Box 1695
Bismarck, ND 58502
(701) 223-2711

OF COUNSEL:
DAVID E. ENGDAHL
University of Puget Sound
School of Law
950 Broadway Plaza
Tacoma, WA 98401
(206) 756-3485

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

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Only two points in the Brief for the United States merit any reply.

I.

After conceding that gubernatorial consent is necessary for waterfowl production area acquisitions with moneys from the Migratory Bird Conservation Fund[1], the United States retreated to a "but-the-consent-has-already-been-given-and-it-can't-be-revoked" argument.

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[1] The United States acknowledges "that the United States is required to obtain the consent of the Governor or an appropriate state agency before acquiring waterfowl production areas with moneys from the Migratory Bird Conservation Fund" (U.S. Br. p.16).

The United States first urged, at page 9 of the Motion to Affirm, that gubernatorial consent for land acquisition "may not be revoked and the United States may exercise its right to negotiate for purchase or rent of such land at any time." Apparently having concluded, on further reflection, that such a contention is untenable, the United States now has changed its position. It now contends, at page 14 of its brief, that "Congress must have assumed that the Secretary would be able to rely—at least for a reasonable period of time—on the continued effectiveness of gubernatorial consents". This notion of a "reasonable period" of irrevocability is repeated at page 26 of the United States' Brief.

The term "reasonable period" is never defined in the United States's Brief. However it suggests, at page 26, that a governor must not be free "*promptly* to withdraw" consents because, if he were, "the Secretary would be forced to purchase *immediately* any land, or interest in land" (emphasis added). This, it is argued, would prevent the Secretary from judging what level of federal money and personnel resources to commit, weighing the relative merits of potential acquisitions, and completing appropriate negotiations.

These tasks of the Secretary, however, hardly require a generation; nor do they reasonably require even a decade. It has now been more than twenty years since the first of the North Dakota gubernatorial consents, now pretended to be "irrevocable", were given; the first were given in December 1961, only months after Congress enacted the Wetlands Loan Act of 1961, 75 Stat. 813. No reason whatever appears, even if a "reasonable period" of irrevocability must be assumed, why an unused consent should not be revocable after so many, many years.

The State acted responsibly. There can be no reasonable accusation that North Dakota "promptly" withdrew its gubernatorial consents. Rather, the State reluctantly withdrew the

consents and imposed conditions for future[2] acquisitions because those remedies appeared to be the only effective response to the continuing abuses[3] in the acquisition programs.

II.

The United States has consistently attempted to extend its authority under the Waterfowl Production Area Program. This fact is evident from even a cursory review of the historical context of the program.

The Waterfowl Production Area Program, enacted in 1958 (72 Stat. 486), authorized the Secretary to acquire "small wetland and pothole areas, interests therein, and rights-of-way to provide access thereto" (16 U.S.C. 718d(c)). The governors of North Dakota, after the passage of the Wetlands Loan Act of 1961 (75 Stat. 813), also authorized the Secretary to acquire easements over 1,278,201[4] "acres of wetlands" (J.A. 3-5).

The Secretary, however, did not consider himself constrained by the 1958 Act, the 1961 Act, and the gubernatorial consents. He acquired, without the knowledge or the consent of the governors, waterfowl production area easements covering 4,788,300 acres (J.A. 50)—about 3.5 million acres more than were authorized by the governors.[5]

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[2] The State does not, of course, contend that the withdrawal of consent could adversely affect previously purchased interests in real property.

[3] The abuses are detailed in the initial brief at pp. 27-33.

[4] Governor Guy authorized the acquisition of 1,237,274 wetland acres and Governor Link authorized adjustments of an additional 40,927 wetland acres (J.A. 4-5).

[5] The United States conceded that this litigation—which it initiated—would be "wholly academic" unless "substantial acreage covered by the gubernatorial consents already given remains unacquired" (U.S. Br. p. 17). This 3.5 million acre discrepancy assures that the issue is not "wholly academic".

The easements covered wetlands, potholes, *and upland*—a category never authorized by the 1958 Act and the governors. When questioned about the discrepancy, the United States explained that:

1. "because the peculiar nature of waterfowl production area country—typically consisting of lands characterized by numerous small, scattered and irregularly shaped potholes—the Secretary has not attempted to acquire easements based on metes and bounds descriptions of the individual wetlands or potholes" (U.S. Br. at p. 18); and

2. "the easement *restrictions* apply only to the wetlands" within the 4.8 million acres (U.S. Br. at p. 18).

The first rationalization does not deserve much attention. The United States now claims that the Secretary could ignore the specific limitations (i.e., that the acquisition of only wetland acres was authorized) because compliance would have been inconvenient.[6] Such a position violates both the spirit and letter of 16 U.S.C. 718d(c) and the gubernatorial consents.

The second rationalization deserves attention because it is false. The United States has never confined easement restrictions only to wetlands. Indeed, the United States even acknowledges in its Brief (n. 14 at p. 18) that "a landowner remains free to conduct *on the uplands* farming practices and any other activities *so long as those activities are not inconsistent with the easement restrictions*" (emphasis added).

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[6] However, the Secretary was able to delineate the wetlands in post 1976 easement contracts (U.S. Br. at p. 18, n. 13); the Nylen contract is an example (J.A. 14-17). In addition, in a June 14, 1982, letter to Governor Olson, Secretary Watt said that the Fish and Wildlife Service:

> has agreed to implement a revised waterfowl production area easement policy. In this regard, the Service will [illegible]ew pre-1976 easement agreements to designate wetland boundaries.

Moreover, when it has seemed convenient in other litigation[7] the Secretary has contended that all 4,788,300 acres (which includes uplands) are within the National Wildlife Refuge System and are, accordingly, subject to the comprehensive federal regulations governing national wildlife refuges.[8]

Yet, the United States illogically argues that it has acquired only 764,522[9] acres of potholes or wetlands and that it, therefore, "is entitled to acquire an additional 752,915 acres of wetlands easements" (U.S. Br. 19). The United States cannot have it both ways. It cannot represent to this Court that it has only a limited, innocuous easement interest in 764,522 acres (thereby allowing the unbridled acquisition of interests in an additional 3/4 million acres) at the same time it argues an opposite position in lower courts.[10] The federal position is disingenuous in the extreme; even harsher characterizations would be appropriate.

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[7] In *Board of Managers, Towner County Water Resource District* v. *Key*, pending, Civ. No. A2-81-178 (N.D., filed November 16, 1981), the Secretary unequivocally stated in interrogatory answers (dated March 26, 1982) that *all land* described in a waterfowl production area easement is within the National Wildlife System.

Interrogatory answer 25 is illustrative. The interrogatory addressed a 160.02 acres tract which contained, according to the Fish and Wildlife Service, 19.00 wetland acres. The interrogatory answer stated that the federal "[d]efendants' claim that 160.02 acres of the tract . . . are either real or personal property of the United States or part of the National Wildlife Refuge System."

[8] 50 C.F.R. Section 25.11 et seq.

[9] This figure only represents the acreage used to compute payments to grantor-landowners: (identified wetland acres) x ($/wetland acre) = payment to grantor. The actual pothole or wetland acreage changes, of course, from day-to-day, season-to-season, or year-to-year and the total acreage cannot be accurately determined.

[10] See, e.g., *United States* v. *Seest*, 631 F.2d 107 (8th Cir. 1980); *Towner County Water Resource District* v. *Key*, No. A2-81—178 (D.N.D., filed Nov. 16, 1981); *United States* v. *Welte*, No. C2-81-49 (D.N.D. March 1, 1982), *appeal docketed*, No. 82-1340 (8th Cir. 1982).

Therefore, even if this Court determines that the gubernatorial consents are irrevocable, this Court should not permit further acquisitions under the authority of the previous consents. Rather, this Court should direct the United States to confine the easement restrictions only to the 1,278,201 "acres of wetlands" authorized by the State's governors.

CONCLUSION

For the reasons previously stated, the decision below should be dismissed.

Respectfully submitted,

ROBERT O. WEFALD
Attorney General

MURRAY G. SAGSVEEN
Special Assistant Attorney General
ZUGER & BUCKLIN
P.O. Box 1695
Bismarck, ND 58502
(701) 223-2711

DAVID E. ENGDAHL
Of Counsel
University of Puget Sound
School of Law
950 Broadway Plaza
Tacoma, WA 98402
(206) 756-3485

Amicus Brief

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MOTION OF NATIONAL WILDLIFE FEDERATION, NORTH DAKOTA WILDLIFE FEDERATION AND NATIONAL AUDUBON SOCIETY FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

RICHARD J. HIMELFARB,
WEINBERG AND GREEN,
100 South Charles Street,
Baltimore, Maryland 21201,
(301) 332-8600,
Attorney of Record,

SUSAN B. BASTRESS,
STEVEN K. FEDDER,
Attorneys for Amici Curiae.

Of Counsel:
THOMAS G. TOMASELLO,
1412 Sixteenth St., N.W.,
Washington, D.C. 20036,
(202) 797-6827.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-773

STATE OF NORTH DAKOTA,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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Pursuant to Supreme Court Rule 36.3, the National Wildlife Federation,

North Dakota Wildlife Federation, and National Audubon Society respectfully move this Court for leave to file a brief as amici curiae in the above entitled case. Appellant has refused to consent to the filing of this brief; the appellee has granted its consent. In support of this Motion, the National Wildlife Federation, North Dakota Wildlife Federation, and National Audubon Society submit the following:

I. Interests of National Wildlife Federation, North Dakota Wildlife Federation, and National Audubon Society

The National Wildlife Federation (NWF) is a non-profit membership organization incorporated under the laws of the District of Columbia in 1939. NWF is the largest non-governmental conservation organization in the world. NWF has affiliate organizations in all 50 states, as well as in Guam, Puerto Rico, and the Virgin

Islands. The Federation's 4.5 million members and supporters are dedicated to the wise use and conservation of natural resources, particularly those of the United States.

The North Dakota Wildlife Federation (NDWF) is a state affiliate of NWF. NWF and its affiliates have a longstanding interest in protecting migratory birds and their wetland habitats.

The National Audubon Society (NAS) is a national membership organization with 470,000 members in all fifty States and in a number of foreign countries. NAS operates several chapters and has 724 members in the State of North Dakota. NAS owns and manages a 442 acre sanctuary in North Dakota which provides habitat for migratory waterfowl species. NAS members bird-watch in the North Dakota prairie pothole region and NAS

scientists have conducted avian research in these wetland areas.

Millions of ducks and other migratory birds breed in the prairie pothole wetlands of North Dakota and surrounding states. NWF, NDWF, and NAS are vitally concerned with the successful implementation of the Migratory Bird Conservation Act ("Conservation Act"), 16 U.S.C. §715, et seq., (1974 and 1982 Supp.), the Migratory Bird Hunting and Conservation Stamp Act ("Stamp Act"), 16 U.S.C. §718, et seq. (1974 and 1982 Supp.), and the Wetlands Loan Act, 16 U.S.C. §715k-3, et seq. (1974 and 1982 Supp.) These statutes authorize the federal government to acquire interests in land and water areas, such as prairie pothole areas, which are essential to the preservation of migratory birds. The United States' migratory bird resources provide recreational benefits, aesthetic beauty, and scientific value for our members and the American people.

II. Importance of the Issue

This case presents a critical issue: whether the State of North Dakota can restrict wetland acquisition programs under the Conservation Act and Stamp Act so as to bring these programs to a standstill. Since the 1977 enactment of the North Dakota legislation at issue in this appeal, there have been no federal wetland purchases in North Dakota under either the Conservation Act or the Stamp Act. Failure to strike down the North Dakota statutes at issue would permanently cripple these acquisition programs.

III. The Amici Curiae Brief Addresses Issues Not Discussed by Appellee, United States of America

Brief of amici addresses an issue which we believe will not be addressed by appellee, the United States of America. Specifically, NWF, NDWF, and NAS argue that the consent provisions of 16 U.S.C.

§715k-5 (1982 Supp.) do not apply to the acquisition of interests in waterfowl production areas, as defined in the Stamp Act. In addition, NWF, NDWF, and NAS believe that their positions on all issues will assist the Court in reaching a decision on this appeal.

IV. Conclusion

In light of the critical importance of the issues before this Court to the National Wildlife Federation, the North Dakota Wildlife Federation, the National Audubon Society, and the members of these organizations, amici pray that they be permitted to file an amici curiae brief.

V. Consent of Appellee

Appellee, through its counsel, Honorable Rex E. Lee, Solicitor General of the United States, has consented

to the filing of this brief of amici curiae by letter dated April 13, 1982.

Respectfully submitted,

Richard J. Himelfarb
Weinberg and Green
100 South Charles Street
Baltimore, Maryland 21201
(301) 332-8600

Attorney of Record

Susan B. Bastress
Steven K. Fedder

Attorneys for Amici Curiae

Of Counsel:
Thomas Tomasello
1412 Sixteenth Street, N.W.
Washington, D.C. 20036
(202) 797-6827

Attorney for
National Wildlife Federation, North Dakota Wildlife Federation, and National Audubon Society

July 2, 1982

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of July, 1982, a copy of the foregoing Motion for Leave to File a Brief as Amici Curiae was mailed to Honorable Rex E. Lee, Solicitor General of the United States, U.S. Department of Justice, Washington, D.C. 20530, Attorney for Appellee, the United States of America, and to Murray G. Sagsveen, Esq., Special Assistant Attorney General for the State of North Dakota, Zuger & Bucklin, P.O. Box 1695, Bismark, North Dakota 58502, Attorney for Appellant, the State of North Dakota.

Richard J. Himelfarb

Richard J. Himelfarb

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

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THOMAS G. TOMASELLO,
1412 Sixteenth St., N.W.,
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(202) 797-6827.

QUESTIONS PRESENTED

1. Whether gubernatorial consent is required prior to the United States' acquisition of interests in land in North Dakota for use as waterfowl production areas pursuant to 16 U.S.C. § 718d(c).

2. Whether North Dakota legislation that purports to restrict federal acquisitions of waterfowl production areas is invalid under the Supremacy Clause of the United States Constitution.

3. Whether gubernatorial consent for acquiring waterfowl production areas, once given, may later be revoked.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES.	iv
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
INTRODUCTORY STATEMENT	5
ARGUMENT.	17
I. CONGRESS DID NOT INTEND THE GUBERNATORIAL CONSENT REQUIREMENT TO APPLY TO WATERFOWL PRODUCTION AREAS.	17
II. NORTH DAKOTA STATUTES VIOLATE THE SUPREMACY CLAUSE BECAUSE THEY CONFLICT WITH THE PURPOSES AND OBJECTIVES OF CONGRESS. . .	22
III. EVEN IF GUBERNATORIAL CONSENT IS REQUIRED, THE PREVIOUSLY GRANTED CONSENTS ARE VALID AND CANNOT BE REVOKED.	30

Page

A. Gubernatorial consent previously given is sufficient to authorize the acquisition of approximately 700,000 additional wetland acres in North Dakota. 30

B. The consents granted by Governors Guy and Link can be neither revoked, modified, or conditioned. 35

CONCLUSION 39

TABLE OF AUTHORITIES

	Page
CASES:	
Edgar v. MITE Corp., ___ U.S. ___, 50 U.S.L.W. 4767 (June 23, 1982)	27,28
Florida Lime Growers, Inc. v. Paul, 373 U.S. 132 (1963) . . .	27
Hancock v. Train, 426 U.S. 167 (1976).	22
Missouri v. Holland, 252 U.S. 416 (1920).	25
NLRB v. Boeing Co., 412 U.S. 67 (1973)	34-35
Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978)	27
Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967)	32,38
Udall v. Tallman, 380 U.S. 1 (1965).	35
United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974).	25,26
United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973)	24,38
United States v. North Dakota, 650 F.2d 911 (8th Cir. 1981), appeal docketed, No. 81-773 (1982)	16

Page

United States v. Welte, No. C2-81-49 (D.N.D. March 1, 1982). 35

Vance v. Terrazas, 444 U.S. 252 (1980). 36

Watt v. Alaska, 451 U.S. 259 (1981). 18

CONSTITUTIONS AND STATUTES:

U.S. Constitution art. VI, cl. 2. . 26

15 U.S.C. §§ 78m(d), (e) (1974) . . 28

15 U.S.C. §§ 78n(d) and (f) (1974). 28

16 U.S.C. § 703 et seq. (1974 and 1982 Supp.) 8

16 U.S.C. § 712(b) (1982 Supp.) . . 9

16 U.S.C. § 715 et seq. (1974 and 1982 Supp.) 6-7,10

16 U.S.C. § 715a (1982 Supp.) . . . 11

16 U.S.C. § 715c (1982 Supp.) . . . 11

16 U.S.C. § 715f (1974) 11

16 U.S.C. §§ 715k-3 - 715k-5 (1974 and 1982 Supp.) 13

16 U.S.C. § 715k-5 (1982 Supp.). 13,17

Page

16 U.S.C. § 718 et seq (1974 and 1982 Supp.) 10

16 U.S.C. § 718d(c) (1982 Supp.). 12,17

28 U.S.C. § 1254(2) (1974). 36

Pub L. 95-552, reprinted in 1978 U.S. Code, Cong. & Ad. News 4722 11

S. Rep. No. 594, 94th Cong., 2nd Sess., reprinted in 1976 U.S. Code Cong. & Ad. News 271. 16

S. Rep. No. 747, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code Cong. & Ad. News 2251 30

107 Cong. Rec. 17,171 (August 28, 1961) 19,20

107 Cong. Rec. 117,111 (May 28, 1961) 14

47 Fed. Reg. 16 (1982). . . . . .

45 Stat. 1222 (1929). 7

N.D. Cent. Code § 20.1-02-18.1 (1977). 22,29

N.D. Cent. Code § 20.1-02-18.3 (1981). 7

N.D. Cent. Code § 47-05-02.1 (1977). 24,30

Page

TREATIES:

Convention for the Protection of Migratory Birds, August 16, 1916, United States - Great Britain, 39 Stat. 1702. 8,9

Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States - Mexico, 50 Stat. 1311, T.S. No. 912. 8,9

Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, United States - Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 8,9

Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States - Union of Soviet Socialist Republics, 29 U.S.T. 4647, T.I.A.S. No. 9073 8,9

MISCELLANEOUS

39 Op. Att'y Gen. 73 (1937) 18

Brief of Appellant. . . . . passim

Joint Appendix. . . . . passim

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INTERESTS OF AMICI CURIAE

Pursuant to Supreme Court Rule 36.3, the National Wildlife Federation, the

North Dakota Wildlife Federation, and the National Audubon Society file this brief as amici curiae in support of appellee. A motion for leave to file accompanies this brief.

The National Wildlife Federation (NWF) is a non-profit membership organization incorporated in 1939 under the laws of the District of Columbia. NWF is the largest non-governmental conservation organization in the world and has affiliate organizations in all fifty states, as well as in Guam, Puerto Rico, and the Virgin Islands. Its 4.5 million members and supporters are dedicated to the judicious use and conservation of natural resources.

The North Dakota Wildlife Federation is a state affiliate of NWF. NWF and its affiliates have a strong and continuing interest in protecting migratory birds and this nation's wetlands.

The National Audubon Society (NAS) is a national membership organization with 470,000 members representing all fifty States and in a number of foreign countries. NAS operates several chapters and has 724 members in the State of North Dakota. NAS owns and manages a 442 acre sanctuary in North Dakota which provides habitat for migratory waterfowl species. NAS members bird-watch in the North Dakota prairie pothole region and NAS scientists have conducted avian research in these wetland areas.

SUMMARY OF ARGUMENT

While it has been the practice of the United States Fish and Wildlife Service to obtain the consent of states in which it seeks to acquire interests in land for waterfowl production areas, prior consent is not required by law. Unlike refuges, waterfowl production areas may be acquired

without the limitations and requirements imposed by the statutory scheme applicable to migratory bird refuges.

Even though consent was not required, Governors Guy and Link of North Dakota authorized the federal acquisition of some 1.5 million acres of waterfowl production areas in that state. Relying on these consents, the Fish and Wildlife Service purchased over 750,000 acres of permanent easements. In 1977, North Dakota placed limitations and conditions on the acquisition of easements on the remaining acreage. Those limitations and conditions are in opposition to Congressional purposes and objectives. Because of the hostility of the North Dakota statutes to federal law and treaty obligations, these statutes must yield under the Supremacy Clause to the overriding national interest in protecting migratory birds.

INTRODUCTORY STATEMENT

The State of North Dakota has launched a legislative fusillade designed to halt a vital United States conservation program. The National Wildlife Federation, the North Dakota Wildlife Federation, and the National Audubon Society have filed this brief as *amici* because each is convinced that the wetlands acquisition program under attack is essential to the survival of migratory waterfowl in this country. North Dakota has enacted several statutes which, if permitted to stand, would thwart congressionally mandated conservation policy and national treaty obligations. Both the United States District Court for the District of North Dakota and the United States Court of Appeals for the Eighth Circuit have declared these North Dakota statutes unconstitutional because they subvert the

provisions and purposes of federal statutes. These decisions should be affirmed.

In 1977, the State of North Dakota enacted legislation intended to curb the right of the federal government to acquire small wetland areas from willing sellers in that State. One statute vested each county in which a federal land acquisition is proposed with veto authority over the acquisition. This statute also required the federal government to reimburse each county for studies conducted to determine whether to exercise its veto power. A second state statute challenged in this case limits the term of all easements granted in North Dakota to ninety-nine years. This restriction would prevent the United States from acquiring such interests "in perpetuity," an express federal policy as reflected in the Migratory Bird Conservation Act, 16 U.S.C. § 715 et seq. (1974 and

1982 Supp.)[1] Upon the advice of the Attorney General of the United States, the Department of the Interior stopped negotiating permanent easements for waterfowl production areas pending judicial resolution of the effect of these state statutes on federal acquisitions.[2] Joint Appendix [hereinafter referred to as as J.A.] at 33-34.

1/ The purpose clause of the Migratory Bird Conservation Act states that the Act is designed:

> To more effectively meet the obligations of the United States under the migratory bird treaty with Great Britain by lessening the dangers threatening migratory game birds from drainage and other causes, [and] by the acquisition of areas of land and water to furnish in perpetuity reservations for the adequate protection of such birds.

45 Stat. 1222 (1929).

2/ A statute enacted by the State of North Dakota after the commencement of this litigation further assaults the federal wetland acquisition program by suspending the authority of the federal government to acquire interests in land for migratory bird reservations and prohibiting the governor from consenting to further acquisitions until plans are developed to manage previously acquired lands. N.D. Cent. Code § 20.1-02-18.3 (1981).

The United States has entered into separate Conventions with Great Britain (on behalf of Canada), Mexico, Japan, and the Soviet Union for the purpose of protecting migratory birds.[3/] To initially implement the British Convention, Congress enacted the Migratory Bird Treaty Act in 1918. 16 U.S.C. § 703 et seq. (1974 and 1982 Supp.) This Act was amended to allow the implementation of the Conventions

3/ Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States - Great Britain (on behalf of Canada), 39 Stat. 1702]hereinafter referred to as British Convention]; Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States - Mexico, 50 Stat. 1311, T.S. No. 912 [hereinafter referred to as Mexican Convention]; Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, United States - Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 [hereinafter referred to as Japanese Convention]; and Convention Concerning the Conservation of Migratory Birds and Their Environment, Nov. 19, 1976, United States - Soviet Union, 29 U.S.T. 4647, T.I.A.S. 9073 [hereinafter referred to as Soviet Union Convention].

with Mexico in 1936, Japan in 1974, and the Soviet Union in 1978. See 16 U.S.C. § 712(b) (1982 Supp.).

The obligation to protect the habitat upon which migratory birds depend is mandated by each of these Conventions[4/] and by federal legislation enacted in furtherance of United States conservation policies. To complete the implementation of the British Convention by authorizing property acquisitions essential for upholding our national commitment to protect migratory

4/ The Mexican Convention addresses the need to establish "refuge zones" for migratory birds. Mexican Convention, Art. II(3). The 1974 Japanese Convention extended this obligation to protect habitat by requiring each party to "take appropriate measures to preserve and enhance the environment of birds it protects." Japanese Convention, Art. III, § 3. The 1976 Soviet Union Convention requires the identification of areas of "special importance" to migratory birds and measures necessary to protect these areas. Soviet Union Convention, Art. IV, para. 2(c).

birds, Congress enacted the Migratory Bird Conservation Act ("Conservation Act") in 1929. 16 U.S.C. §715 et seq. (1974 and 1982 Supp.)

In 1934, Congress enacted the Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. §718 et seq. (1974 and 1982 Supp.) ("Stamp Act"), which established the Migratory Bird Conservation Fund for the acquisition of land authorized by the Conservation Act. Until 1958, when the Stamp Act was amended to allow the purchase of small wetland and pothole areas (designated as "waterfowl production areas"), the Migratory Bird Conservation Fund was used primarily for the purchase of lands in fee simple for migratory bird refuges.

Migratory bird refuges, as opposed to waterfowl production areas, are established by the federal government to protect and allow for the management of

tracts of land encompassing contiguous and permanent wetlands. The Conservation Act requires a state to enact enabling legislation before the federal government may acquire migratory bird refuges in that state, and approval to be obtained from a federal commission established to review each refuge proposal. 16 U.S.C. §§ 715(f), (a) (1974 and 1982 Supp.) To facilitate such acquisitions, the federal government must consult with state and county authorities. 16 U.S.C. § 715c (1982 Supp.)

Smaller and less permanent wetland areas were outside the protections of the migratory bird refuge system, and as a result, were being lost due to drainage for developmental purposes at the rate of 350,000 acres per year. Pub.L. 95-552, reprinted in 1978 U.S. Code, Cong. & Ad. News 4722. The prairie pothole region, including North Dakota and parts of Canada,

is so named for the shallow depressions which retain water through the dry summer months. Each square mile of such land is dotted by approximately seventy to eighty potholes three to four feet deep. Congress recognized the value of these transient wetlands to the production of migratory waterfowl and in 1958 amended the Stamp Act to allow for their acquisition as waterfowl production areas. Because the stringent requirements for acquiring refuges would impose a tremendous administrative burden on the federal government if made applicable to the acquisition of waterfowl production areas, Congress expressly provided in the 1958 amendments to the Stamp Act that such areas "may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act . . . ." 16 U.S.C. § 718d(c) (1982 Supp.). Therefore, when the federal government began

acquiring interests in small wetland and pothole areas in 1958, it negotiated only with private landowners to obtain easements to restrict burning, filling, and drainage activities during the few months of the year that migratory waterfowl used such wetlands for breeding purposes.

In 1961, Congress enacted the Wetlands Loan Act to provide for interest-free advances to the Migratory Bird Conservation Fund. 16 U.S.C. §§ 715k-3 - k-5 (1974 and 1982 Supp.). Congress added this proviso:

> No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency.

16 U.S.C. § 715k-5 (1982 Supp.). The legislative history of the 1961 Wetlands Loan Act makes it clear that Congress intended merely to formalize the prior

practice of the Department of the Interior. 107 Cong. Rec. 117,111 (May 28, 1961). Because the Department of the Interior, prior to 1961, had never coordinated with the governor or appropriate state agency when acquiring waterfowl production areas, this proviso appears to apply only to refuge acquisitions. Of course, it was the waterfowl production area acquisition program that was the beneficiary of the 1958 exemption from State regulatory review.

After passage of the 1961 legislation, the United States Fish and Wildlife Service nonetheless began to seek gubernatorial consents before it acquired waterfowl production areas. Accordingly, the Service asked the Governor of North Dakota to consent to the acquisition of easements for waterfowl production areas over a specified number of wetland acres in North Dakota.

Governor Guy complied with this request. Subsequent adjustments in acreage were approved by Governors Guy and Link, bringing the total acreage for which consent had been given to approximately 1.5 million acres by 1977. J.A. at 4-5.

By 1978, the federal government had acquired permanent easements to only 764,522 acres of wetlands in North Dakota. J.A. at 48. Since then, however, no additional permanent easements have been purchased. Thus, the consents already given authorize the federal government to acquire approximately 700,000 additional acres of wetlands for waterfowl production areas.

The purchase of small wetlands and pothole areas in North Dakota, South Dakota, and Montana has consistently been targeted by Congress as the highest priority for inclusion in the federal

migratory waterfowl habitat acquisition program. S. Rep. No. 594, 94th Cong., 2d Sess., reprinted in 1976 U.S. Code Cong. and Ad. News 271. Because of a reversal in policy by Governor Link stemming from hostility to an unrelated federal land acquisition plan by the federal government, involving the Garrison Diversion Unit, United States v. North Dakota, 650 F.2d 911, 917 n. 13 (8th Cir. 1981), that state has attempted to withdraw, condition, and qualify consents which it has already given for acquiring waterfowl production areas. The protection of waterfowl habitat in the United States, Canada, Japan, Mexico, and the Soviet Union must not be subjected to state policy designed to destroy this federally mandated program.

ARGUMENT

I. CONGRESS DID NOT INTEND GUBERNATORIAL CONSENT REQUIREMENTS TO APPLY TO WATERFOWL PRODUCTION AREAS.

The Courts below held that the Wetlands Loan Act is part of the Migratory Bird Conservation Act, and thus concluded that the acquisition of waterfowl production areas is exempt from the gubernatorial consent requirement of 16 U.S.C. § 715k-5 (1982 Supp.) by operation of the Stamp Act, § 718d(c) (1982 Supp.).

However, even if this Court determines that the Wetlands Loan Act is not part of the Migratory Bird Conservation Act, the federal statutes enacted in furtherance of our national policy to protect migratory birds should be read in pari materia and in harmony with legislative history to give effect to congressional intent to exempt acquisition of waterfowl production areas from burdensome regulatory requirements.

39 Op. Att'y Gen. 73 (1937) (an act enacted as part of a comprehensive program must be read in conjunction with other acts of that program); Watt v. Alaska, 451 U.S. 259 (1981) (conflicting federal statutes should be read in conjunction with their legislative histories as a means of resolving the conflict).

Contrary to appellant's assertion that the legislative history of the Wetlands Loan Act "clearly indicates that the gubernatorial consent provision was to govern the acquisition of waterfowl productions areas," Brief of Appellant at 13, the legislative history of the Wetlands Loan Act suggests that the gubernatorial consent provision was intended only to formalize administrative practice in the acquisition of migratory bird refuges, not waterfowl production areas.

Prior to 1961, large tracts of wetlands suitable for migratory bird

refuges under the Conservation Act were acquired by the federal government after consulting, as a matter of informal practice, with representatives of state and county governments. 107 Cong. Record 17,171 (August 28, 1961). In contrast, when acquiring easements for waterfowl production areas under the 1958 Stamp Act, the Fish and Wildlife Service negotiated with landowners without consultation with state or local officials. As distinquished from acquisition of tracts for refuges requiring year-round active management, the easements for waterfowl production areas generally covered small non-contiguous wetland areas and only restricted the landowner's activities during the few months of the year that such areas are used by migratory birds.

In commenting on the addition of the gubernatorial consent requirement of the Wetlands Loan Act, Senator Magnuson stated the following:

> [W]e do this anyway, but thought we would make it more safe - to provide that no land should be purchased under the plan unless the Federal Government and the State involved had a complete agreement ... as to the nature of the lands and the acreages involved.

107 Cong. Record 17,171 (August 28, 1961).

The practices referred to by Senator Magnuson did not relate to acquisition of waterfowl production areas. In fact, in further commenting on the need for the funds to be advanced under the Wetlands Loan Act, Senator Magnuson stated that the "program" in question had been reviewed by Congress "some 4 years ago". Id. The program to which he was referring could not have been related to acquisition of waterfowl production areas, since that program was not authorized by Congress until 1958. Thus, the legislative history of the 1961 Wetlands

Loan Act suggests that the gubernatorial consent requirement imposed by this legislation should be construed to apply only to the acquisition of refuges and not to the acquisition of waterfowl production areas.

When the 1961 Wetlands Loan Act is read in the context of its own legislative history and the clear and unambiguous expression of Congressional intent embodied in the 1958 Stamp Act, such a reading suggests that it is extremely unlikely that Congress intended to impose state restrictions on the right of the federal government to acquire interests in small wetland and pothole areas.

Requiring the federal government to secure gubernatorial consent before its purchase in fee of large tracts of land is entirely consistent with the limitations and restrictions embodied in the Conservation Act for the acquisitions of refuges. Conversely, requiring gubernatorial consent

before the acquisition of an easement over each small wetland and pothole area would result in administrative burdens and delays directly conflicting with the intent of Congress to facilitate the purchase of such areas by exempting them from the restrictions of the Conservation Act.

To construe the proviso to the 1961 Wetlands Loan Act as allowing states to regulate the acquisition of waterfowl production areas would contravene the rule of interpretation established by this Court that such state regulation of a federal program must be authorized by clear and unambiguous congressional action. Hancock v. Train, 426 U.S. 167, 179 (1976).

II. THE NORTH DAKOTA STATUTES VIOLATE THE SUPREMACY CLAUSE BECAUSE THEY CONFLICT WITH THE PURPOSES AND OBJECTIVES OF CONGRESS.

North Dakota Century Code § 20.1-02-18.1 (1977) would effectively

grant counties in that State the power to veto land acquisitions already consented to by the governor. This statute would require the governor or his designee to submit the proposed federal acquisitions to a board of county commissioners for the county in which the land is located. It would also require the federal government and the county agent to each prepare an impact analysis for submission to the board detailing the fiscal, social, and agricultural impact of the acquisition. These impact analyses would then be forwarded to the state planning division which would be charged with the duty of submitting them to all interested state agencies and political subdivisions. The state agencies and political subdivisions would then have thirty days to submit their comments. Finally, the statute would require the

federal government to reimburse the county agent for his impact analysis.

A second statute at issue here, N.D. Cent. Code § 47-05-02.1 (1977), provides that, "the duration of the easement . . . on the use of real property in no case shall . . . exceed ninety-nine years." These requirements, if permitted to stand, would apply to the 700,000 unpurchased acres of wetlands for which gubernatorial consent has already been obtained.

The importance of the Conservation Act is underscored by United States v. Little Lake Misere Land Co., 412 U.S. 580, 597 (1973), where the Court stated that "[to] permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act." Speaking

of the national scope of the program, the Court in Missouri v. Holland, 252 U.S. 416, 435 (1920) stated:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the state, and has no permanent habitat therein. But for the treaty and the statute, there soon might be no birds for any powers to deal with . . . . It is not sufficient to rely upon the states.

In United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974), the court upheld the conveyance of an easement to the United States on the grounds that the North Dakota statute prohibiting such conveyance was "aberrant" or "hostile" to federal interests in acquiring rights to property for waterfowl production areas. The court in Albrecht held:

> We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right. To hold otherwise would be to permit the possibility that states could rely on local property laws to defeat the acquisition of reasonable rights to their citizens' property pursuant to 16 U.S.C. §718d(c) and to destroy a national program of acquiring property to aid in the breeding of migratory birds.

United States v. Albrecht, 496 F.2d 906, 911 (8th Cir. 1974) (footnote omitted). The Supremacy Clause, U.S. Const. art. VI, cl. 2, is violated where a state statute

conflicts with a valid federal statute. Edgar v. MITE Corp., ___ U.S. ___, 50 U.S.L.W. 4767 (June 23, 1982). Conflicts exist either "where compliance with both federal and state regulations is a physical impossibility . . ." Id. at 4767; Florida Lime Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Edgar v. MITE Corporation, supra at 4767 (quoting Ray v. Atlantic Richfield Co., 435 U.S. 151, 158 (1978)).

As was true in Edgar, it is not contended in this case that it would be impossible to comply with both the state and federal statutes. The issue is whether state law stands as an obstacle to accomplishing the purposes of the Conservation Act.

In Edgar, an Illinois statute was struck down because it frustrated the purposes of the Williams Act, 15 U.S.C. §§ 78m(d), (e) and §§ 78n(d) and (f)(1974). In enacting the Williams Act, Congress did not intend to prohibit state regulation of corporate takeovers; the Illinois statutes were not voided on that basis. Rather, the Court looked at the policy considerations justifying the federal statute and found that the state statute was hostile to the purposes articulated by Congress.

The Court found the Illinois statute was preempted by the Williams Act for three reasons: first, unlike the Williams Act, the state statute required that the target company and the Secretary of State be given 20 days advance notice of the takeover bid; second, the state statute imposed extended delays into the tender offer process; and third, that the state statute

allowed the Secretary of State to pass on the substantive fairness of the offer.

A similar result is compelled here. The North Dakota statutes are hostile to the federal waterfowl production program. North Dakota Century Code § 20.1-02-18.1 (1977) requires that the consents be given on a county-by-county basis. Thus, the Fish and Wildlife Service, in seeking to obtain consents, would be forced to deal with at least forty-one political subdivisions in North Dakota alone. Second, the Fish and Wildlife Service would have to prepare impact statements for each county and reimburse each county for preparing its own. Third, the Fish and Wildlife Service would, in the event of opposition from the political subdivisions, be required to present its case to the county commissioners. Finally, the ninety-nine year easement limitation of

N.D. Cent. Code § 47-05-02.1, directly contravenes the legislative intent that such easements be "in perpetuity." See S.Rep. 747, 90th Cong., 1st Sess., reprinted in 1967 U.S. Code, Cong. and Ad. News 2251.

The North Dakota statutes at issue would make the acquisition of waterfowl production areas more difficult by imposing additional administrative steps for approval. They would impose substantial delay and expense upon the Fish and Wildlife Service in their fulfillment of Congress' mandate to protect migratory waterfowl. The statutes would involve local authorities in a decision-making process which, even if gubernatorial consent were a prerequisite to the acquisition of waterfowl production areas, was never intended to so complicate the easement acquisition program. Finally, in

spite of the national commitment to provide for the protection of migratory waterfowl, the North Dakota statutes can only be read to be hostile to the purchase of waterfowl production areas. Therefore, these statutes violate the Supremacy Clause.

III. EVEN IF GUBERNATORIAL CONSENT IS REQUIRED, THE PREVIOUSLY GRANTED CONSENTS ARE VALID AND CANNOT BE REVOKED.

A. Gubernatorial Consent Previously Given Is Sufficient To Authorize The Future Acquisition Of Approximately 700,000 Additional Wetland Acres in North Dakota.

Appellant urges this Court to find that prior gubernatorial consents are insufficient to authorize the federal government to acquire additional lands with money from the Migratory Bird Conservation Fund, either on the ground that (1) "specific" gubernatorial consent was never given (Brief of Appellant at 19-20), or (2) prior

acquisitions have exceeded the scope of past gubernatorial consents (Brief of Appellant at 20-22). For the following reasons, these arguments are without merit and must be disregarded.

First, appellant suggests that Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967) stands for the proposition that consent required for the acquisition of waterfowl production areas must be "specific" as to "each specific tract" to be acquired. Because the governors of North Dakota have not consented to each specific pothole area, such as would be described in a metes and bounds survey, appellant argues that consent already given was invalid. Based on the intent of Congress, as expressed in the legislative history to the Wetlands Loan Act, the court in Swan Lake found the consent given by the

Governor of Mississippi in 1960 to the acquisition of refuge lands to be sufficient under the 1961 Wetlands Loan Act. The court in Swan Lake did not address whether consents given in other forms would be equally sufficient for refuge acquisitions, nor whether waterfowl production areas are to be treated in the same manner.

Unlike refuges, waterfowl production areas are small, numerous and scattered pockets of wetlands which provide breeding habitat for migratory waterfowl during several months of the year. Waterfowl production areas fluctuate in size as a function of weather, groundwater levels and shifts in topography. The restrictions prohibiting draining, filling, and burning these small wetlands are sufficient to protect them without the need for full-time federal supervision. Because of these

considerations, and the virtual impossibility of requiring the federal government to conduct a boundary survey for each and every pothole area to be so restricted, the governors of North Dakota consented to the acquisition of specified acreages of wetlands within forty-one counties of North Dakota. J.A. at 3-5. Thus, in light of the significant differences between migratory bird refuges and waterfowl production areas, the gubernatorial consents given in the instant case were as specific as necessary both as to acreages and the nature of lands to be acquired.

Furthermore, the gubernatorial consents given in the instant case were considered by the federal government and the State of North Dakota to be adequate for the acquisition of approximately 750,000 acres of wetlands over a sixteen year period. See NLRB v. Boeing Co., 412

U.S. 67 (1973); Udall v. Tallman, 380 U.S. 1 (1965).

Relying on dictum in the recent decision by the District Court of North Dakota in United States v. Welte, No. C2-81-49 (D.N.D. March 1, 1982), appellant argues that the acreages of both uplands and wetlands included in the description of easements for waterfowl production areas apply towards the total acreages consented to by the governors of North Dakota in the instant case. However, the consents given by their own terms limit the acquisitions to a specified number of acres of wetlands, not uplands. J.A. at 3. Further, easements for waterfowl production areas include restrictions which apply to the wetland acres only. J.A. at 14-17. The fact that the description of a particular easement includes upland areas does not convert an upland area into a wetland.

Further, this factual dispute concerning acreages of waterfowl production areas in North Dakota was not raised before the United States District Court, before the Eighth Circuit Court of Appeals, or in the Statement of Jurisdiction in this case, and cannnot be raised herein. Accordingly, this Court is without jurisdiction to review it. Vance v. Terrazas, 444 U.S. 252 (1980). See generally 28 U.S.C. § 1254(2) (1974).

This Court should hold that the United States is authorized under valid gubernatorial consents to acquire additional wetlands in order to achieve federal acquisition objectives in North Dakota.

B. The Consents Granted By Governors Guy And Link Can Be Neither Revoked, Modified, Or Conditioned.

Governors Guy and Link gave their unconditional consent to the purchase of

over 1.5 million acres of wetlands in North Dakota. Of that total, approximately 750,000 acres have been purchased by the Fish and Wildlife Service. Until the passage of the North Dakota Statutes in 1977, there was no question that the necessary consents had been obtained for the purchase of an additional 700,000 wetland acres in that state.

The challenged North Dakota statutes materially affect the ability of the Fish and Wildlife Service to complete its land acquisition program, and in fact, caused the Attorney General of the United States to advise the Department of the Interior against any further purchases of waterfowl production areas pending resolution of this litigation. J.A. 33-34.

Once unconditional gubernatorial consent to land acquisitions have been issued, such consent cannot be withdrawn.

Swan Lake Hunting Club v. United States 381 F.2d 238 (5th Cir. 1967). The legal effect of the consents cannot later be altered. Id. at 245. The need for finalty and certainty in federal conservation programs was articulated in United States v. Little Lake Misere Land Co., 412 U.S. 580, 597 (1973):

> [Such federal land acquisition programs] anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds.

Although the facts in Little Lake were somewhat unlike those in the case at bar, the rationale for precluding the revocation of consent is equally pursuasive.

In planning and executing an international system of waterfowl habitat,

the Fish and Wildlife Service must not be subjected to the caprice of changing state conservation policy. Whether the theory is expressed under the rubric of estoppel, ratification, laches, waiver or contract, the result is the same. Once the states have spoken, the Department of the Interior must be able to rely upon their pronouncements so that they can effectively negotiate with landowners within the state and with the appropriate authorities in other affected states.

Not only do the revoked consents endanger the acquisition of the remaining wetlands in North Dakota, but they call in question the value of the waterfowl production areas already purchased, since each is a part of an integrated system.

CONCLUSION

Waterfowl production areas are a critical component of national conservation

policy established through legislation and international conventions. The North Dakota legislature has enacted statutes which are hostile to both the specific ends of the conservation program and to the constitutional scheme of state-federal relations. For these reasons, the decision of the United States Court of Appeals for the Eighth Circuit affirming the decision of the United States District Court for the District of North Dakota should be affirmed.

Respectfully submitted,

RICHARD J. HIMELFARB

WEINBERG AND GREEN
100 South Charles Street
Baltimore, Maryland 21201
(301) 332-8600

Attorney of Record

SUSAN B. BASTRESS
STEPHEN K. FEDDER

Attorneys for Amici Curiae

Of Counsel:

THOMAS G. TOMASELLO
1412 Sixteenth Street, N.W.
Washington, D.C. 20036

(202) 797-6827
Attorney for National
Wildlife Federation,
North Dakota Wildlife
Federation and National
Audubon Society

July 2, 1982

Docket Sheet

NO. 81-773-AFX	TITLE	North Dakota, Appellant v. United States

DOCKETED	COURT
Oct. 19, 1981	United States Court of Appeals for the Eighth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellant: Murray G. Sagsveen
	Counsel for Appellee: Solicitor General
Oct. 19, 1981	Statement as to jurisdiction filed. (Record filed).
Nov. 20, 1981	Order extending time to file a response to the J. S. until Dec. 21, 1981.
Dec. 18, 1981	Order extending time to file a response to the Jurisdictional Statement until Jan. 18, 1982. (Further extension).
Jan. 19, 1982	Motion of the U. S. to affirm filed.
Jan. 20, 1982	DISTRIBUTED. 2-19.
Feb. 23, 1982	REDISTRIBUTED. 2-26.
Mar. 1, 1982	JURISDICTION NOTED.
Feb. 1, 1982	Reply brief for the appellant filed. (D).
Mar. 30, 1982	Order extending time to file the joint appendix and appellant's brief on the merits until May 15, 1982.
May 14, 1982	Brief for the appellant filed.
May 14, 1982	Joint appendix filed.
June 7, 1982	Order extending time to file the appellee's brief on the merits until July 2, 1982.
July 2, 1982	Motion of National Wildlife Federation, et al. to file a brief as amici curiae filed.
July 2, 1982	Brief for the appellee filed.
Aug. 25, 1982	CIRCULATED.
Sept. 9, 1982	The motion of National Wildlife Federation, et al. for leave to file a brief as amici curiae is GRANTED.
Oct. 8, 1982	Reply brief for the appellant filed. (D).
Nov. 2, 1982	ARGUED.